

PUBLIC HEARING
COMMISSION ON STATE MANDATES

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TIME: 9:04 a.m.
DATE: Thursday, January 27, 2000
PLACE: Commission on State Mandates
State Capitol, Room 126
Sacramento, California

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Reported By:

DANIEL P. FELDHAUS
CSR #6949, RDR, CRR

A P P E A R A N C E S

COMMISSIONERS PRESENT

ANNETTE PORINI, Chair
Representative for B. TIMOTHY GAGE, Director
State Department of Finance

ALBERT P. "AL" BELTRAMI
Public Member

LOREN SUTER
Representative for KATHLEEN CONNELL
State Controller

MILLICENT GOMES
Representative for LORETTA LYNCH, Director
State Office of Planning and Research

WILLIAM SHERWOOD, Vice Chair
Representative for PHILIP ANGELIDES
State Treasurer

COMMISSION STAFF PRESENT

PAULA HIGASHI, Executive Director

PAT HART JORGENSEN, Chief Counsel

DAVID SCRIBNER, Staff Counsel

PUBLIC TESTIMONY

Appearing Re Item 6:

For County of San Bernardino:

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A P P E A R A N C E S

Appearing Re Item 6: continued

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For Governor's Office of Emergency Services:

BOB McKECHNIE

For California State Association of Counties:

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A P P E A R A N C E S

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JAMES M. APPS

For San Diego Unified School District:

JAMES A. CUNNINGHAM

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For Education Mandated Cost Network:

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ERRATA SHEET

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I N D E X

Proceedings	Page
I. Roll Call	9
II. Closed Executive Session Pursuant to Government Code Sections 11126 and 17526	
A. Pending Litigation	
Item 14 County of San Bernardino v. State of California, et al.; SCV 52190 .	10
B. Personnel	
Item 15 Discussion and action, if appropriate, on report from Personnel Subcommittee	10
III. Report from Closed Executive Session	10
IV. Election of Officers Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Section 1181.4, Subsection (c)	
Item 1 Chairperson and Vice Chairperson .	10
V. Approval of Minutes	
Item 2 November 30, 1999	12
Item 3 December 1, 1999	12
Item 4 December 22, 1999	12
VI. Proposed Consent Calendar	
Informational Hearing Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 8	
A. Adoption of Proposed Parameters and Guidelines	
Item 10 Annual Parent Notification - Staff Development CSM 97-TC-24 San Diego Unified School	

District 13

I N D E X

Proceedings	Page
VI. Proposed Consent Calendar	
Informational Hearing Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 8	
B. Adoption of Proposed Amendment to Parameters and Guidelines	
Item 11 Collective Bargaining/Collective Bargaining Agreement Disclosure 98-4425-PGA-12 Santa Ana Unified School District and Stockton Unified School District	13
C. Adoption of Proposed Statewide Cost Estimate	
Item 12 SIDS Training - Remand - CSM 4412 County of Los Angeles	13
VII. Hearings and Decisions, Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 7	
A. Test Claim	
Item 5 School Crimes Reporting II 97-TC-03 San Diego Unified School District (continued to next meeting) . . .	70
Item 6 Standardized Emergency Management Systems (SEMS) - CSM 4506 County of San Bernardino (continued to next meeting). . . .	14
Item 7 Involuntary Transfers - CSM 4459 San Diego Unified School District (not heard)	

I N D E X

Page

VII. Hearings and Decisions, Pursuant to California
Code of Regulations, Title 2, Chapter 2.5,
Article 7

B. Proposed Statements of Decision

- Item 8 Dismissal of Withdrawn Portions
of the Special Education Test
Claim filed by Santa Barbara
Superintendent of Schools with
the State Board of Control
SB 90-3453
(continued to future meeting) . .

72

C. Appeal of Executive Director's Action

- Item 9 Special Education for Ages 3 to 5
and 18 to 21,
CSM 3986A, SB 90-3453
Long Beach Unified School
District
(continued to next meeting). . . .

72

VIII. Executive Director's Report

- Item 13 Workload, Governor's Budget,
Local Claims Bill, Legislation
etc. 111

IX. Next Agenda 113

X. Public Comment 114

XI. Adjournment of Hearing 116

Reporter's Certificate 117

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BE IT REMEMBERED that on Thursday, January 27, 2000, commencing at the hour of 9:04 a.m., thereof, at the State Capitol, Room 126, Sacramento, California, before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the following proceedings were held:

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CHAIR PORINI: We'll go ahead and call to order this meeting.

May I have roll call?

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: Here.

MS. HIGASHI: Mr. Suter?

MEMBER SUTER: Here.

MS. HIGASHI: Ms. Gomes?

MEMBER GOMES: Here.

MS. HIGASHI: Mr. Sherwood?

MEMBER SHERWOOD: Here.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: Here.

All right, we will adjourn this open session and go into closed session pursuant to Government Code section 11126, to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate upon pending litigation listed on the published notice and agenda. So, now, we're going across the hall.

MS. HIGASHI: We're going to go across the

hall. So you can stay seated.

CHAIR PORINI: So you're welcome to stay here.

(The Commission met in executive closed session from
9:05 a.m. to 9:54 a.m.)

CHAIR PORINI: All right, we'll go ahead and
get started.

I want to report that at the beginning of
today's public meeting, the Commission met in closed
executive session pursuant to Government Code 11126, to
confer with and receive advice from legal counsel for
consideration and action, as necessary and appropriate,
upon pending litigation listed in the published notice
and agenda.

We will go ahead with the second item of
business on our agenda.

MS. HIGASHI: Which is actually Item 1, which
is the election of officers.

State law requires the Commission members to
elect a chairperson and vice-chairperson. The
Commission's regulations specify that members, as defined
in Government Code section 17525, are eligible to be
officers; and that the election occur at the January
meeting. The regulations also authorize the executive
director to conduct the election but do not specify an
election procedure.

Under Roberts Rules of Order, there are two
ways to conduct the election: By nomination or by motion

and second.

How does the Commission wish to proceed?

CHAIR PORINI: Commission Members?

MEMBER GOMES: I'd like to make a nomination
for Annette Porini for chairperson.

MEMBER SHERWOOD: On the nomination, we do not
need a second then. But would you ask your question to
proceed on a nomination --

MS. HIGASHI: Right.

MEMBER SHERWOOD: -- basis or a --

MS. HIGASHI: Right. I was just going to say,
we would need to elect Mr. Gage, the Director of Finance,
as the chairperson.

MEMBER GOMES: Okay.

MS. HIGASHI: So I'll just rephrase the motion.

MEMBER GOMES: I'd like to make a motion to
elect Timothy Gage and the chairperson of the Commission.

MEMBER SHERWOOD: I'll second that.

MS. HIGASHI: All those in favor of the motion?

(Chorus of "ayes" were heard.)

MS. HIGASHI: Any opposed?

Motion carries. Mr. Gage is elected
chairperson.

CHAIR PORINI: Then --

MS. HIGASHI: Election for vice-chairperson.

CHAIR PORINI: All right, I would like to
nominate State Treasurer Philip Angelides as vice-chair.

Do we need a second on that?

MEMBER GOMES: Not on a nomination, I don't think.

CHAIR PORINI: Pardon me?

MS. HIGASHI: You can close the nomination.

CHAIR PORINI: Okay.

MS. HIGASHI: All those in favor of electing State Treasurer Philip Angelides as vice-chairperson, please say aye.

(Chorus of "ayes" were heard.)

MS. HIGASHI: He's elected.

CHAIR PORINI: All right.

MS. HIGASHI: Thank you.

This brings us to approval of the minutes. We have three sets of minutes for approval. Item 2 is approval of the November 30th minutes. And I believe all of you were present at that meeting, except for Mr. Suter.

CHAIR PORINI: Members, do you have any comments, corrections, additions?

MEMBER BELTRAMI: Madam Chairman, with the Chair's concurrence, I would move all three of the minutes.

CHAIR PORINI: All right.

MEMBER BELTRAMI: The Controller was the only person -- the Controller representative was the only person absent, and I'd doubt that Mr. Suter's going to

vote on this, anyway.

CHAIR PORINI: All right, so we have a motion.

Do we have a second on that motion?

MEMBER GOMES: Second.

CHAIR PORINI: We have a motion and a second
that we adopt all three sets of minutes.

All those in favor, indicate with "aye."

(Chorus of "ayes" were heard.)

CHAIR PORINI: Opposed?

Abstained?

MEMBER SUTER: Abstained.

CHAIR PORINI: All right.

MS. HIGASHI: Okay.

CHAIR PORINI: The next item?

MS. HIGASHI: We're now to the proposed consent
calendar. The proposed consent calendar consists of the
following items:

Item 10, adoption of the Proposed Parameters
and Guidelines for the annual parent notification staff
development test claim. I'd like to note that this new
mandate is amended into the existing P's and G's on
annual parent notification.

Item 11, adoption of the proposed amendment to
the Parameters and Guidelines for collective bargaining
and collective bargaining disclosure. The change made
here is to increase the hourly cap for professional and
consultant services to 135 dollars per hour.

And then Item 12, adoption of the proposed statewide cost estimate for the SIDS training test claim. The proposed estimate here is for 1.4 million dollars for costs incurred from fiscal year 1990-91 through the budget year.

CHAIR PORINI: All right, does anyone wish to remove anything from the consent calendar?

Do I have a motion to adopt the consent calendar?

MEMBER SHERWOOD: Move for approval.

MEMBER GOMES: Second.

CHAIR PORINI: I have a motion and a second. All those in favor, indicate with "aye."

(Chorus of "ayes" were heard.)

CHAIR PORINI: All right. Next item?

MS. HIGASHI: This brings us to the hearing portion of our meeting. We've had a request from the Department of Finance staff to skip over Item 5, and to start the hearing with Item 6. So we'd like to do that.

And before we begin, though, I'd like all of the witnesses for Items 5, 6, 8 and 9, to please stand and raise their right hands.

(All witnesses were duly sworn by Ms. Higashi.)

MS. HIGASHI: Thank you.

With that, we'll proceed to Item 6.

CHAIR PORINI: All right, this is the Standardized Emergency Management System.

Would our witnesses please come forward?

MS. HIGASHI: This item will be presented by chief counsel Pat Hart Jorgensen.

MS. JORGENSEN: Item 6 regards Standardized Emergency Management Systems, known as SEMS.

In response to the devastation of the East Bay Hills fire, the test claim legislation and implementing regulations were enacted. The test claim added Article 9.5 of the Government Code, entitled, "Disaster Preparedness," which directs the Office of Emergency Services (OES), in coordination with all interested state agencies involved in emergency response, to establish, by regulation, the Standardized Emergency Management System (SEMS) for responding to and managing emergencies and disasters involving multiple jurisdictions or multiple agencies.

The test claim requires SEMS to include preexisting systems utilized by OES as a framework for responding to and managing emergencies and disasters involving multiple jurisdictions and agencies.

The test claim also requires adopting local agencies to ensure that their response personnel maintain minimum SEMS training competencies and requires adopting local agencies to complete an "after action" report following any declared disaster.

While the test claim does not specifically require local agencies to adopt SEMS, failure to do so

results in a loss of funding for specified response-related personnel cost.

The Commission has before it two issues: The first one is, does the test claim constitute a new program or higher level of service? The next issue is, if the test claim does constitute a new program or higher level of service, is the test claim a state mandate?

As to the first issue, do the test claim legislation and implementing regulations constitute a program or higher level of service, the Office of Emergency Services contends that every program listed under the SEMS framework was part of state law prior to the enactment of the test claim and merely ratifies and clarifies that which was previously intended by the Legislature. Accordingly, it is their position that SEMS does not create a new program or higher level of service.

On this issue, staff recommends that the Commission find that the test claim constitutes a new program or higher level of service. However, if the Commission agrees with staff's recommendation, they have to go on to the next issue, and that is, if the test claim legislation constitutes a new program or higher of level of service, is the test claim a state mandate?

The claimant contends that the test claim requires local agencies to implement and use SEMS if they wish to continue to be eligible for specified response-related personnel costs. Accordingly, it is

their position that SEMS constitutes a state-mandated program.

OES contends that the receipt of response-related personnel costs under disaster distance programs has always been discretionary. It is their position that local agencies are not now, nor were they ever required to implement SEMS; and that the continued receipt of response-related personnel funding acts as an incentive rather than a mandate for local agencies to adopt SEMS.

The Department of Finance contends that since it is "not aware of any statute that requires a local agency to request and/or receive state disaster funds," it is their position that the consequences for failing to adopt SEMS and thereby losing the specified state disaster assistance funds, does not justify a conclusion that SEMS constitutes a state mandate.

The Department of Finance also, in reliance on opinions issued by the Attorney General, relative to another test claim, further maintains that reliance on the Sacramento II factors is unfounded, since Sacramento II dealt with a federal mandate rather than a state mandate; and that the state's statutory scheme precludes a finding that a "coercion proviso" should be considered when determining whether a state mandate exists.

Staff concludes that the Commission has the two

following options in determining whether the costs incurred in compliance with SEMS constitutes costs mandated by the state.

Option one, a finding that SEMS is state mandated. The Commission may approve this test because application of the Sacramento II factors which consider the nature and the intent of the program, the legal and practical considerations for participation or compliance, and penalties assessed for failure to comply, evidence that the claim is coercive, leaving local agencies with no real discretion regarding compliance with SEMS; and that the intent behind section 6, article XIII B, is to reimburse local agencies for new programs.

SEMS is a new program and local agencies are forced to use SEMS a "carrot and stick" analysis, therefore SEMS is state mandated and subvention is required. Or the Commission can adopt option two, a finding that SEMS is not a state mandate.

The Commission can deny this test claim based on the fact that the Commission's statutory scheme precludes applying the Sacramento II "carrot and stick" factors to state law. Specifically, Government Code section 17513, which defines, "Costs mandated by the federal government," includes a "compulsion proviso." This explains that the definition of costs mandated by the federal government includes costs resulting from the enactment of a state law or regulation to meet federal

requirements where failure to enact that law or regulation would result in substantial monetary penalties or loss of federal funds to the state. The same "compulsion proviso" is not found in Government Code section 17514, which defines the term, "Costs mandated by the state."

Staff has no recommendation as to which of these two alternatives the Commission should adopt. We know that this issue has been before the Commission before. There are several things coming up, and we'd like to hear what the Commission has -- what their thoughts are on this.

Due to the complexity of the issues, staff recommends that the hearing be divided into two parts, and that the Commission first receive testimony and determine the first issue, that is, whether the test claim legislation and implementing regulations constitute a new program or level of service; and then go on to the issue as to whether or not SEMS is a state mandate.

CHAIR PORINI: All right, can we have witnesses go around the table and identify themselves and state who they represent?

MS. FAULKNER: I'm Marcia Faulkner with the County of San Bernardino, test claimant.

MR. CUNNINGHAM: Jim Cunningham with the San Diego Unified School District. We're an interested party in this matter, and we're one of the co-claimants on the

school site council's claims that's referred to in the staff analysis.

MR. APPS: I'm Jim Apps for the Department of Finance.

MR. McKECHNIE: Bob McKechnie, Governor's Office of Emergency Services.

MR. MINNEY: Paul Minney with Girard and Vinson on behalf of Mandated Cost Systems, Incorporated.

CHAIR PORINI: All right, shall we start with you, Mrs. Faulkner?

MS. FAULKNER: Great. Thank you.

First of all, I'd like to compliment the Commission's staff. They really delved into this and outlined some very intricate measures. And basically, rather than repeating all the arguments, we do agree with the staff's recommendation -- or staff's option number one, is the finding of it being a mandate; that this is a constitutional -- or this is a new program or higher level of service; and then we will devote most of our arguments to the upcoming issue.

CHAIR PORINI: All right. Mr. Cunningham?

MR. CUNNINGHAM: I'm here to address the second issue, if that's the way that the Commission decides to bifurcate it.

CHAIR PORINI: All right.

MR. McKECHNIE: I'm willing to address the first issue.

CHAIR PORINI: All right.

Paul, were you addressing the first issue or the second?

MR. MINNEY: The second.

CHAIR PORINI: All right. Then we'll go ahead with OES.

MR. McKECHNIE: There have been a lot of written submittals back and forth regarding the issues involved in this claim, arguing semantics, interpretation, and the meaning of the various constitutional and statutory provisions and words impacting the claim. But I wonder if, amongst this flurry of argument, the basic purpose and simplicity of what has been termed the Standardized Emergency Management System, known as SEMS, has not been lost.

SEMS is not a discreet requirement that jurisdictions employ "X" number of fire engines per "Y" population, or that they equip emergency vehicles in a specified manner, or that a set of number of persons be dispatched to any given emergency incident. It is really just simply a basic method of managing any emergency management incident which requires coordinated efforts between dissimilar groups.

Preparation is a fact of life within any emergency service organization. Equipment must be continuously inspected, maintained and tested. Likewise, emergency staff must be continuously trained, tested and

exercised. Such training and exercise obviously includes the operation of equipment, rescue techniques, safety, and medical procedures, among others. Equally as obvious, is that emergency responders must learn and practice the organizational structure in which they operate; who the other players are that they might be called upon to assist, or who they, themselves, might call upon to assist them.

They need to know what their special needs are, what their chain of command is, and who will simply just be in charge. This is just basic stuff that necessarily must be part of any emergency responder's mental tool kit. It's inconceivable that such training would not be part of any instructional program for these special people, regardless of whether SEMS exists or not.

What I'm trying to say, is that any costs associated with the emergency management training and the practice of the management principles, are already built into any credible training and management program and system, and always have been.

SEMS only presents a framework -- a lattice, if you will -- within which to construct this training and its application; training which would occur regardless of whether SEMS existed or not. SEMS merely provides principles which, if followed, promote interdisciplinary and interagency cooperation by ensuring that everyone speaks a similar language, honors a common protocol for

management, and respects the necessity of an organizational structure.

Taken in its true light, OES does not see how the SEMS legislation or regulations can be construed as a new program or increased level of service, or that involves any mandated costs. In fact, it is likely that an analysis of utilizing SEMS would show a reduction of costs, training curricula is standardized and provided by the state. Its use substantially reduces potential confusion and chaos in emergency situations, permitting greater efficiencies of operation and, most importantly, its use serves our public better.

I'm willing to answer any questions, if you have any at this time.

CHAIR PORINI: Any questions from members?

Mr. Beltrami?

MEMBER BELTRAMI: Why was SEMS passed? It sounds like it just doesn't do anything that wasn't being done before per your comments.

MR. McKECHNIE: Well, it really doesn't. Most organizations did subscribe to those concepts, to the concepts that are incorporated into SEMS. It was passed because during the Oakland fires, I think your counsel pointed out, there was a lot of confusion among the various emergency agencies as to what structure would be used to manage the incident, and the Legislature felt that it was necessary to get everybody on common ground

and to employ those preexisting principles which have been used by most emergency service organizations throughout the state.

MEMBER BELTRAMI: Thank you.

CHAIR PORINI: Other questions?

Mr. Apps?

MR. APPS: No.

CHAIR PORINI: Okay.

MS. FAULKNER: Could I comment on something there?

CHAIR PORINI: Certainly.

MS. FAULKNER: SEMS has added a lot of new features. One of the things it requires is training of elected officials and department heads; it requires training of fiscal personnel on how to respond in the event of a disaster. I am one of those people that has to go down to the county OES in the middle of the night if we have an earthquake, because I'm in charge of disaster recovery programs -- the cost.

Before SEMS, I didn't have to do this. And before SEMS, we didn't have to go through all these training programs and involve people beyond who are the normal response personnel.

Thank you.

CHAIR PORINI: All right. Any other questions or comments on this issue?

MEMBER SHERWOOD: One comment. Would OES's

comment on that be, that was or should have been taking place before SEMS was passed?

MR. McKECHNIE: It should have been, and it seems to me that it's logical that it would have been.

And I would note that the regulations, which are not all that compulsive, as the representative from San Bernardino County maintains, essentially the local jurisdiction has considerable discretion and leeway in deciding what particular training that they want to give their employees.

SEMS only sets up a curriculum and asks that the local agencies utilize that curriculum and training. It does not mandate which particular people shall undertake training or be trained.

I can just read it to you. It says, "Emergency response agencies shall determine the appropriate level of SEMS instruction for each member of their staff based upon the staff member's potential assignment during an emergency response."

It's wide open. It's very discretionary.

CHAIR PORINI: Mr. Beltrami?

MEMBER BELTRAMI: I want a clarification. Marcia, the comment is that you don't have to be there. I don't quite understand why the auditor's office is in the emergency center when there's an earthquake. But, you know, I know you have to be there afterwards count up the damage so you can submit it to the state and feds.

MS. FAULKNER: Right, right.

MEMBER BELTRAMI: But you say you have to be there.

MS. FAULKNER: I'm sorry. In the incident command system, it requires various sections, and it recommends -- State OES and the training manuals and the regulations recommend that all of these parties be present at the county OES, if there is an incident occurring. And one of those functions is the chair of the finance and administration section which deals with the cost recovery issues, time-keeping issues, risk management issues, and otherwise all of the financial costs that are involved with SEMS. And this is required, this is a part of the common standard framework, so to speak, that OES has set up.

And, you know, it's still something that has to be done. It's something in the program. And there are regulations and a training manual, training films that State OES publishes and sends down to the counties, which are then passed on and showed to the affected county employees.

MEMBER GOMES: I'm confused as to when you started out talking, you said that it was recommendation, and then went to say that it was a requirement. Is it -- which is it?

MS. FAULKNER: It's a requirement. I'm sorry, I used the wrong word.

MR. McKECHNIE: I would have to dispute that. It's a requirement if they require it of themselves, but it's not a requirement of the state. The state gives them, as I indicated by reading that regulation, very broad discretion in how detailed that training will be and who the participants in the training will be.

MEMBER SHERWOOD: Does the instruction from the state level indicate a requirement or a recommendation?

MS. FAULKNER: I'd have to research that point.

MEMBER SHERWOOD: Your statement is that within your local government entity, it's a requirement of you?

MS. FAULKNER: There's a requirement, right.

MEMBER SHERWOOD: Not necessarily that it's a requirement from the state to the local entity?

MS. FAULKNER: I have been advised it's due to the SEMS program and due to the state requirement.

The other point I want to make is, all of these various pieces were, in fact, optional, before SEMS. It was a framework, but the framework is not the same thing as an entire existing program. So at the time SEMS was passed into law, it was because there was no mandated program up until that point.

MEMBER SHERWOOD: Marcia, before SEMS was passed into law, were you participating in the program, in your local agency's program? Not SEMS, but in emergency situations?

MS. FAULKNER: Not back in 1991. I inherited

that in '95.

CHAIR PORINI: But was your county --

MS. FAULKNER: Uh-huh.

CHAIR PORINI: -- isn't that your question?

MEMBER SHERWOOD: Yes, was the county?

MR. McKECHNIE: Or your office?

MS. FAULKNER: Oh, the county did, in fact, conduct training. They did, in fact, carry out certain provisions, like fire scope and practice for emergency response. But none of that was actually required, and certainly none of it was required by the state.

MEMBER SHERWOOD: Once again, required or recommended?

MS. FAULKNER: Required.

MR. McKECHNIE: Well, I think it's voluntary.

MEMBER SHERWOOD: That's where there's a difference of opinion.

MEMBER GOMES: Yes.

CHAIR PORINI: All right, Members, any other questions or witnesses? Any other comments on the first issue?

MR. MINNEY: Well, I was curious if Commission staff was going to address the comments issues raised here today; but I really wasn't prepared to address the first issue because I thought it was more conclusive; but my readings of the SEMS program leads me to believe because of the Office of Emergency Services has spoken,

that if cities in local districts and counties don't adopt these procedures, they could be exposed to, per se, negligence, if there were a disaster and they were found to have ignored these procedures that were set in place or dictated from on high.

So it was my understanding that most, if not all entities had tried to comply with, to a certain degree or to a high degree, with these programs. But I don't have that information today.

MR. McKECHNIE: I don't think we've ever maintained that they suffer any increase in potential liability for failure to comply to third parties. In fact, the Emergency Services Act contains an extremely broad immunity, which would probably be invoked in such a case and preclude that kind of a liability.

MS. JORGENSEN: If I might point it, it seems we're getting into discussion on the second issue right now.

CHAIR PORINI: Right. So the first issue before us now is the issue of whether there's a higher level of service.

MS. JORGENSEN: Right.

CHAIR PORINI: Do we have a motion on this issue?

MEMBER GOMES: Well, I would like to make a motion that it is not a higher level of service or a new program.

CHAIR PORINI: Do I have a second?

Well, I'll go ahead and second it.

So we have a motion and a second.

MEMBER BELTRAMI: Ms. Chairman, a discussion?

CHAIR PORINI: Yes, Mr. Beltrami?

MEMBER BELTRAMI: I'm still not clear how much greater the requirements are than were in place before. Maybe there were no requirements before. You know, we've had civil defense and OES around for a long time, and we've had mutual aid agreements, that sort of thing.

Now, whether there's a requirement that, for instance, the fiscal people be in the emergency operating center when there is a disaster, is that -- I'm still not understanding, is that a requirement of the county in this case or a city, or is it a requirement under SEMS?

MS. FAULKNER: It's my understanding it's a requirement under SEMS. It's a part of one of the programs that State OES has indicated has been in effect before SEMS, and that's the "Incident Command Structure," which brings into the fore, all of the various things that the counties have to do -- counties and cities and school districts have to do.

As far as whether we were required to do that before SEMS, we weren't required. We weren't statutorily directed to conduct all of these plans, to have mutual aid agreements, to have the fire scope, or to respond to fires in response to the incident command structure.

I mean, it makes good sense; but before the introduction of SEMS, we weren't required to do those things.

MEMBER BELTRAMI: Is there additional reporting requirements now?

MS. FAULKNER: Pardon me?

MEMBER BELTRAMI: Are there additional reporting requirements under SEMS?

MS. FAULKNER: Definitely. One of the key ones, as the staff mentioned, is that after any disaster, we have to respond and send in a special report on the after-incident-action -- after-action-incident report. I think that's it. I'm sorry about that.

There's also -- we're required periodically -- and I'm not sure if it's annual or what -- but we're required to report whether we're following SEMS or not. And this has to be done on an ongoing basis.

MEMBER GOMES: Is it -- oh, I'm sorry, Mr. Beltrami.

MEMBER BELTRAMI: May I just ask the emergency services representative? Wouldn't the goal of this legislation be that every local government participate?

MR. McKECHNIE: That's the goal.

MEMBER BELTRAMI: I mean --

MR. McKECHNIE: That's the only way it makes sense, because of the way that the state is constructed with so many multiple jurisdictions --

MEMBER BELTRAMI: Right.

MR. McKECHNIE: -- fire districts, and
whatever --

MEMBER BELTRAMI: Right. I mean, it wouldn't
work if only 50 percent would --

MR. McKECHNIE: -- and, you know, emergencies
don't recognize any political boundaries.

MEMBER BELTRAMI: Right.

MR. McKECHNIE: So you need a system like this
to effectively respond.

MEMBER BELTRAMI: Okay.

MEMBER SHERWOOD: Can I follow that up quickly?

CHAIR PORINI: Bill, let's let Ms. Gomes --

MEMBER GOMES: Just a comment to OES. The
program is truly discretionary in nature. I mean, it's
not -- I mean, emergency service is something that the
counties and local agencies already participate in
because that's the nature of the beast.

MR. McKECHNIE: Yes.

MEMBER GOMES: But this -- I mean, just from
reading the documents here, that it is and always has
been discretionary for them to participate in the SEMS.

MR. McKECHNIE: Well, I would argue that it
isn't discretionary. There's always been a statute on
the books that says that local jurisdictions shall comply
with what is called the State Emergency Plan. Now, that
plan incorporated all of the elements of SEMS, although

perhaps under different names. But from a practical standpoint, they were always there.

Nobody ever chose to enforce that on local agencies, I will admit. However, arguably, that mandate, if it were, has been there since time began in California, essentially. So from that standpoint, I think it's always been a requirement; it's just it's never been stated as such.

CHAIR PORINI: All right, thank you.

Mr. Sherwood?

MEMBER SHERWOOD: No, you've answered my question.

CHAIR PORINI: All right.

Mr. Faulkner?

MS. FAULKNER: I'm sorry, I'm under the impression the state -- or the -- what is it called, the SEP, state emergency plan --

MR. McKECHNIE: Uh-huh.

MS. FAULKNER: -- is, in fact, directed to the Office of Emergency Services. It's directed to State Personnel. It does not tell the county or the schools or the cities or anybody else what they have to do in order to remain ready for a disaster.

MR. McKECHNIE: No, I would have to disagree. I think I cited a section -- I don't have it on the top of my head -- in one of my responses to the staff's analysis.

I'm just informed by the Attorney General's office that it's 8568.

The state emergency plan shall be in effect in each -- in each what -- political jurisdiction of the state. The state emergency plan shall be in effect in each political subdivision of the state, and the governing body of each political subdivision shall take such action as may be necessary to carry out the provisions thereof.

MEMBER GOMES: And you're reading from --

MR. McKECHNIE: I'm reading from the Government Code of the state.

CHAIR PORINI: Mr. Beltrami?

MEMBER BELTRAMI: I don't understand, if everything was really in place before, why this legislation would be adopted, which would then say that unless you comply with this, you will not be eligible for specified response-related personnel costs.

MR. McKECHNIE: I seem to -- well --

MEMBER BELTRAMI: Yeah, I mean, either it was in place or this is something new. I mean, a higher level requirement it seems.

MR. McKECHNIE: Well, I think there were a couple of things in action there.

First of all, there was a political reason to do SEMS, because of the fiascos that involved the Oakland fire. Probably some certain legislators wanted to bring

that to the forefront, to get attention to this issue that it hadn't been done. And the SEMS, by giving it a name, by bringing it all together in one place, more effectively, I think, presented that existing requirement.

MEMBER GOMES: To clarify, Mr. Beltrami --

MEMBER BELTRAMI: Yes.

MEMBER GOMES: -- I believe in one of the documents it says that they lose their right for funding.

MEMBER BELTRAMI: Yes.

MEMBER GOMES: However, in the bulletin produced by OES says they have the right to access the state funding. So to me it kind of turns on the word "access to state funding" --

MEMBER BELTRAMI: You know, I mean --

MEMBER GOMES: -- rather than have that right, and have --

MEMBER BELTRAMI: I understand. I'm sure you're well aware that if there's a disaster, that you can apply for federal and state assistance; right?

MEMBER GOMES: That's right.

MEMBER BELTRAMI: But you have to justify it. So, I mean, that doesn't mean it's an automatic thing. But it's --

MEMBER GOMES: That's right.

CHAIR PORINI: That's correct.

MEMBER BELTRAMI: Rights, it's not automatic.

MEMBER GOMES: That's what I'm saying.

MEMBER BELTRAMI: But there's an assumption there at the local level that you're going to getback, you know. Otherwise, Congress wouldn't be appropriating new monies every time there's a hurricane in Florida and that sort of thing. And it goes right through the state and down to the locals.

You're right, it's not guaranteed. It's not --

MEMBER GOMES: Either way, either before or after SEMS.

MEMBER BELTRAMI: (Nodding affirmatively.)

CHAIR PORINI: Ms. Faulkner?

MS. FAULKNER: Okay. The gentleman from State OES commented and cited Government Code section 86- -- whatever that was -- that implemented the SEP program.

MR. MINNEY: 8568.

MS. FAULKNER: 8568.

And in Government Code section 8550, which is the introduction to the California Emergency Services Act, that -- and I had written it and sent it in one of my letters but I'd like to read it here:

"The state has long recognized its responsibility to mitigate the effects of natural man-made or war-caused emergencies which result in conditions of disaster or extreme peril to life, property and the resources of the state, and generally to

protect the health and safety and preserve the
lives and property of the people of the state."

And that's where the state is acknowledging its
responsibility. So I don't see how that then turns
around and tells the counties and the cities and the
local agencies to do anything.

MR. McKECHNIE: I think that's -- you know, we
have a contextual problem here. That statute's headed
purpose -- declaration of purpose and policy, and it's
the preamble to the entire Emergency Services Act.

If you were to take what you're arguing to the
extreme, then the state should provide your fire service,
your police service, your emergency medical service. So
I don't believe that that has relevance to the issue
here.

CHAIR PORINI: Ms. Faulkner, don't cities and
counties, in fact, have some responsibility to protect
the citizens of those subdivisions?

MS. FAULKNER: Definitely. We're the first
responder of first -- whatever the term is -- first
instance when there is a disaster. We're the folks that
are out there trying to protect the people.

But it's our contention that SEMS then turns
around and adds all kinds of things to our ability to
preserve and protect the public.

The fire departments, the sheriff's office
already knows how to do that, and they conduct training

programs in their own way, to be able to be the first responders to an incident.

SEMS goes beyond that and adds some things that the state wants us to do, in addition to what we already know how to do.

CHAIR PORINI: And SEMS, you believe, is not voluntary?

MS. FAULKNER: Correct.

MR. MINNEY: Can I add?

I feel like the issues are somewhat blended here between what you bifurcated. The issue whether it's voluntary or discretionary, to me, gets to the point of whether it's a cost mandated by the state -- at least that's the way I understood the way staff was going to break out these issues.

If their analysis on page ten was whether or not this is just a new program, under the regulations and under the cases where if it's a program, it's something that carries out a governmental function providing services to the public. It's unique to the government, not whether or not we actually have to do it. Whether or not we actually have to do it gets to the coercive nature of the funding issue, which is really whether or not it's a cost mandated by the state, which was our second issue -- at least that's the way I understood we were going to address this.

MS. JORGENSEN: Right, that's what I

anticipated.

CHAIR PORINI: Any other questions from members?

Okay, we have a motion and a second before us.

Do you want to repeat your motion?

MEMBER GOMES: My motion is that SEMS is not a new program or a higher level of service within the meaning of the Constitution.

CHAIR PORINI: All right, shall we have roll call?

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: No.

MS. HIGASHI: Ms. Gomes?

MEMBER GOMES: Yes.

MS. HIGASHI: Mr. Sherwood?

MEMBER SHERWOOD: No.

MS. HIGASHI: Mr. Suter?

MEMBER SUTER: No.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: Yes.

MS. HIGASHI: The motion does not carry.

CHAIR PORINI: All right.

MEMBER BELTRAMI: Madam Chair, do I understand it takes four votes for any action to be approved by this body today?

MS. JORGENSEN: That's correct. We need a majority of the existing membership.

CHAIR PORINI: So, since we still are dividing the issue, is there another motion on this issue or would we like to continue discussion?

MEMBER SHERWOOD: I'd like to continue to the second issues.

CHAIR PORINI: All right, setting aside the first issue for now?

MEMBER SHERWOOD: Setting aside the first issue for the moment.

CHAIR PORINI: All right, the second issue now. Ms. Faulkner, did you want to comment on this? Mr. Cunningham?

MS. FAULKNER: Yes, certainly. Thank you very much.

As far as whether there's a mandate or not, I've got four basic points. I'm not an attorney. I can't get into all of the legal innuendos. I can deal with what the plain language is and the straightforward -- more straightforward legal concepts.

As far as responding to the state agencies, the first point is, the state agencies discuss that the Legislature has a right to offer fiscal incentives. And they claim that this is a fiscal incentive, if we comply with SEMS.

But one of the examples given is -- I'm sorry, we don't have a problem with the Legislature being able to grant or offer fiscal incentives. One of the examples

that was given by the state agency was the property tax administration loan program. It provides locals, however, with an offer of new source of funding in order to carry out a specific program.

Another example was provided, the redevelopment agency's low- and moderate-income housing requirement that was used to justify where the -- or to support the argument that the Legislature has the right to offer an incentive. That program is totally outside of the discussion here because the courts have held that the low- and moderate-income housing requirement of redevelopment agencies does not come under the provision of proceeds of taxes. So, therefore, they're not even related to the state mandates concept under Article XIII-B.

Then the state agencies also argue legislative intent. They claim that the Legislature has intended this to be an inducement. We don't see that as such. We see it as a punishment or a penalty.

From the practical standpoint, the Legislature has established this body -- the Commission on State Mandates -- as the sole and exclusive authority. So if the Legislature intends one thing, if it doesn't meet the tests for the Prop. 13(b), section 6 provisions, then the legislature's intent is -- I believe it's San Jose that says, "The legislative findings and intent are irrelevant to the issue."

Okay, the other point I'd like to make is, the SEMS program and the reimbursement for the disaster cost is not a clear closely-linked concept, like it is on the other -- like property tax administration program. You get the money, you do specific work spending that money, and that's how you carry out your program.

SEMS requires annual activities, annual costs every year, on an ongoing basis. And the counties and the local agencies have to spend their money every year; but we don't get any incentive for spending that money. We never get a reward until there's a disaster.

So we see that -- it's comparable, I guess, to a life insurance policy. You pay your premiums, you have these expenditures to pay your premiums; but the only time you get the reward is if someone dies or if there's a disaster. That's how we can see this occurrence here.

So we certainly see the purpose or the idea about us implementing SEMS, if we want to retain our right to disaster funding. We see that as a mandate; we see that as a punishment. And if there's no disasters, we never get the reward, but yet we still have to expend and implement and operate the SEMS program year after year after year.

So I'd like the Commission to consider some of the common sense things that are going on here. The fact that the Legislature cannot override the Prop. 13, Article XIII-B of the Constitution, just by using a term

or offering an incentive that really looks like a punishment.

Thank you.

CHAIR PORINI: Questions from members?

Actually, I have a question. The little red fire trucks that sit in fire stations, I guess I'm a little taken aback by your comment of comparing that and saying there's never a reward unless there's a disaster. There are some jobs in life, I think, that are designed to respond specifically to emergencies. People in a fire station, trained year-round, they keep their equipment in top shape and performance, and yet the only time that they go out and perform their duty statement for saving lives or protecting property is when there actually is a fire. So I guess I'm quite uncomfortable with your analogy to that. I think that some people have that job.

And, unfortunately, counties seem to.

MS. FAULKNER: Right. Yes, I understand your concern; and certainly protecting the lives of the citizens is rewarding in and of itself.

But this particular test claim statute offers a financial reward or penalty, depending on how you want to interpret that, which the people in the fire station, the various fire districts and fire departments of cities and counties -- they do their job, they try and save the lives, they care about their job, but they don't get any money from the state for that. And these are not

activities that are SEMS-related. These are activities that are the basic fundamental practice of the fire departments.

CHAIR PORINI: Any other questions?

Mr. Cunningham?

MR. CUNNINGHAM: Thank you. As I mentioned before, we're interested in this test claim, both as eligible -- potential eligible claimants as school districts, but we're also interested in this because the Department of Finance is raising a legal argument for a test claim that will come before the Commission next month, the school site council's claim. And the record on that test claim has not closed, and I don't want the Commission in this test claim to make a decision that will effect the school site council's test claim, without having the benefit of all of the arguments on that issue.

I can address the issue generally today, but I want to have the opportunity to present my full arguments when that test claim comes before the Commission.

Generally, the Department of Finance has raised an argument that the "optional versus mandatory" program analysis that's in the two cases cited -- it's the Sacramento II case and the Hayes case -- applies only to an analysis of whether or not a federal program is mandated on the state and does not apply to whether a state program is mandated on the local level. And the linch pin in their argument deals with some of the

differences and distinctions between two provisions of the Government Code, sections 5 -- I'm sorry, 17513, which defines costs mandated by the federal government; and section 17514, which deals with costs mandated by the state.

And there are differences between these sections. Actually, we think that the differences support the claimant's argument and not the state's argument.

The Department of Finance has concentrated on the second sentence of 17513, which provides, "The costs mandated by the federal government includes costs resulting from the enactment of a state law or regulation or failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to the public or to private persons in the state."

So basically, this is the pass-through type of provision; that if all the federal government does is to pass on to local governments the same requirement that the federal government imposed on local governments, the state has no reimbursement obligations. That's -- what this is intending to say is if the mandate on the local government truly comes from the federal government and not from the state and the state didn't have any discretion on how to pass that through to levels and didn't add anything, then it's not a state mandate.

And there is no counterpart to that in 17514, which deals with the definition of costs mandated by locals. And it makes sense that it's not there.

There is no parallel ability for a local government to adopt an ordinance or a resolution that would pass costs imposed on it by the state to some other entity. Even if there was that ability, there's no constitutional requirement for the local governments to reimburse that other entity. So the lack of the pass-through type of language that's in that second sentence I don't think is substantial to the issue.

What the Department of Finance failed to point out is that there is a third sentence in 17513, and that says, "Costs mandated by the federal government does not include costs which are specifically reimbursed by the federal government or programs or activities --" I'm sorry, "services which may be implemented at the option of the state." And that's really the true optional argument that they're trying to raise.

Again, it says that if the state has an option on whether or not it's going to implement this federal program, it's excluded from the definition of costs mandated by the federal government.

Well, there is no parallel to that in 17513. The Department of Finance would have you believe that there is something in 17513 that says if the state requirement can be implemented at the option of the local

government, it's not a state mandate. Well, that sentence doesn't exist in 17514. So it's the absence of this exclusion, I think, that the Commission ought to look at.

The pass-through -- the fact that there's no pass-through provision is not relevant; but the fact that there is no exclusion from state mandates for an optional program is instructive. So I think that the Commission not only has the right, but probably the duty to look at the Hayes and Sacramento II analyses to determine whether or not a program is truly mandated or not. And there are factors other than as the Hayes and Sacramento II cases point out, there are factors other than whether there is a strict or absolute legal compulsion. Something can still be mandated if there are other factors and the financial incentive or penalty can be, in certain instances, so substantial that it raises the program to the level of a mandate; there is no true option, other than to adopt the program due to simply the amount of money.

Now, there are other factors that the Commission can consider; but in the appropriate circumstances, the financial penalty or the financial incentive can be so great that the program, from a practical standpoint is mandated.

Thank you.

MEMBER SHERWOOD: One comment, Jim. I think

one key sentence you had, and several words, "so substantial." If you were to buy into your argument --

MR. CUNNINGHAM: Right.

MEMBER SHERWOOD: -- "substantial," I think is the key matter to look at here or in any case.

MR. CUNNINGHAM: I agree. I think it's a factual matter in each instance.

MEMBER SHERWOOD: And I think that -- I'm not sure on agreeing with you in your argument; but in this particular case, "substantial," I have a problem with; not referring to your upcoming case at all. But it seems to me that this is a voluntary situation. Now, connecting the funding to that is and whether it's substantial or not, along your argument, would be the key. But it seems to me the state has been voluntarily appropriating funds for emergency services, for personnel services over the years, but it still is voluntarily; and that the locals really were not required to participate, nor are they now required to participate in this program. And I'm speaking to this program. And that's the hurdle.

If I was to agree that maybe there are some increased services -- which, frankly, I've heard arguments that made me wonder about that in this particular situation -- I still have a problem here seeing, frankly, that this is a mandatory requirement by the state in this case, or that it is a substantial situation, if I was to lead on into your argument.

MR. CUNNINGHAM: Yes, and again I'm not -- I guess my point really is that the Commission should apply the same test for state mandates and it does for federal mandates; and it should consider all of the factors that are laid out in both Sacramento II and in Hayes.

One of those factors is the level of funding that you would lose as a result of not participating in the program. There are other factors, whether there was an intent to coerce; a number of other things the Commission should consider.

My point is that those factors are the same, whether it is a state program or a federal program. How you come out in any one instance depends on how you weigh the various factors. But I think that the factors and the analysis has to be consistent with whether you're looking at a federal program or you're looking at a state-mandated program.

CHAIR PORINI: All right, Mr. Beltrami?

MEMBER BELTRAMI: Mr. Cunningham, how then do you respond then to the comment that's in the report from Finance, that if we ignore 17514, which is an act of the Legislature, we are, in effect, legislating?

MR. CUNNINGHAM: I don't think I'm asking you to ignore it. I think I'm asking you to apply it in a more common sense way than the Department of Finance would have you look at it. I think if you look at the differences between the two factors, the second sentence

is not material. What is the key distinction between the two is the third sentence, which deals with an exclusion from federal mandates if a program is optional at the state level; and the absence of that same kind of an exclusion in 17513, although the Department of Finance would have you read that sentence into 17513, when it does not exist. So I think actually what you're doing, when you're applying that test, is you are applying the statutes, as written.

I don't agree with their analysis that you are legislating.

CHAIR PORINI: All right, other questions?

Mr. Apps?

MR. APPS: I defer to Mr. McKechnie for the moment.

CHAIR PORINI: All right.

MR. McKECHNIE: I'll just summarize our position, which I'm sure will be obvious.

We say that just because there's an incentive for not complying, that it should not be considered a mandate under the carrot-and-stick approach that was urged upon you by your staff.

OES further believes that the adoption of the Sacramento II carrot-and-stick test in this case would nodded only blur what heretofore are clear distinctions in both the Constitution and statute between what are federal mandates and what are state mandates, it would

obliterate those distinctions. We believe that the adoption of the Sacramento II test is a rule in this case, which go far beyond mere interpretation of the law and infringe on the authority of the Legislature.

I think the way I see these two statutes and the Constitution, the constitutional provisions are similar to this analogy. If I were to tell my kid, "Eat your peas and you can go to Disneyland tomorrow," that's not a mandate. I'm giving him a clear choice between two alternatives. If I sit there and say, "Eat your peas," and hover over him until he eats the things, then I'm giving him a mandate. And I think it's as simple as that. We don't believe that this is a mandate, nor that the carrot-and-stick approach should be applied.

The Attorney General is here, too, and I believe he has some comments to make on this issue. Could I defer to him?

CHAIR PORINI: Certainly.

MR. GRAYBILL: Hi, my name is Jeff Graybill with the Attorney General's Office. I've been asked by the Department of Finance and OES to add a few comments. And basically, I would like to -- and I think it's the Department of Finance's position, to concur with the gentleman from San Diego that this issue ought to be thoroughly considered all together with the sites issue.

But in addition to that, where there's been extensive briefing by our office and there's also a very

good analysis by the legislative analyst that may or may not have been presented in the context of this case, but it certainly has, and it was addressed to the sites claim; but in addition to that, I'd like to comment on the way the staff has presented the options to the Commission. And basically, on the surface especially, it appears to be leading this Commission to a possible conflict with Article III, section 3.5 of the California Constitution, which mandates that no administrative agency, which this Commission is, may refuse to carry out a mandate of the Legislature on the grounds that it believes that mandate is unconstitutional.

And the way the options have been set up, option one encourages the Commission to follow the constitutional meaning rather than the statutory meaning. And that's the way you can justify the first option that was presented.

And option two is that if you follow the statute, you can find that this is not a mandate. And that juxtaposition, I think, could create some problems down the road. And if those are the options, the Commission might well consider rejecting the claim, and giving the claimants their opportunity to proceed to the court system, to get a determination by a court of appeal that the Constitution, if that's what the Legislature meant in 14 as opposed to 13 -- and I'm leaving off the previous three digits -- but that's the remedy that the

Constitution provides for claimants, and that's to get a judgment of a court of appeal, saying that the Constitution requires this, although the statute may not.

So that's the only thing that I would add to the extensive briefing that is available from the legislative analyst and our office with respect to the sites claim, and the very able presentation that's been made by OES and the Department of Finance, which I believe incorporates some of the comments that were made in the sites claim that you'll be considering next month.

So unless there are any questions, that's all I have to add.

CHAIR PORINI: Questions from members? Okay.

Mr. Apps was about to make a statement.

MR. CUNNINGHAM: He's retiring.

CHAIR PORINI: But he hasn't retired yet.

MR. APPS: Thank you, Madam Chair.

Actually I was going to ask Mr. Graybill to come forward and make the presentation.

CHAIR PORINI: All right.

You had a comment?

MR. MINNEY: Yes, just a few comments.

CHAIR PORINI: All right.

MR. MINNEY: One is, I think what I heard Mr. Cunningham say was that the Constitution requires it and the statutes allow it, if I'm not misquoting. I'd also like to say that in my household, the threat of no

Disneyland would seriously be a mandate in my household to eat peas.

I would like to do concur with staff's analysis on this, and also side with Jim Cunningham, that the Commission should consider adopting Hayes and the Sacramento II analysis for these claims, for the same reason that Jim mentioned, and I won't reiterate those.

But I found the analysis that the staff did was excellent in this case. Again, all these would have to be considered on a case-by-case basis. This case being considered this month and then the school site council's to be considered next month.

But I've heard a fiscal penalty for noncompliance today, I've heard a potential for legal liability for noncompliance, I've heard OES discuss a political consequence for noncompliance. And my final concern would be that if we are unable to apply the Sacramento II analysis to these types of situations, that it opens up a huge loophole for the Legislature to continue to dangle the carrot out there on voluntary programs and allow the mandate process to fall apart, where they can just require -- essentially, coerce programs and argue that they're voluntary and, therefore, there's no mandate, if the appropriations don't go over cost.

So I would, on behalf of Mandated Cost Systems and its clients, we've polled and discussed this issue

with them, support the staff's analysis in option one on this test claim.

CHAIR PORINI: All right, any questions from members?

Mr. Burdick, you've joined us.

MR. BURDICK: Yes, Chair Porini and Members, Allan Burdick representing the California State Association of Counties.

I did not stand to be sworn because I did not plan to testify to this. I think this discussion has taken a little different direction, and I -- so--

CHAIR PORINI: Do you want to pause for a moment and we'll get you sworn in?

MR. BURDICK: Yes.

MS. HIGASHI: Do you solemnly swear or affirm that the testimony which you are about to give to the Commission is true and correct based upon your personal knowledge, information and belief?

MR. BURDICK: Yes, I do.

MS. HIGASHI: Thank you.

MR. BURDICK: Thank you very much.

I think it's been -- this has been kind of a difficult hearing, probably. I'm not sure that the bifurcation was fully understood by all of the members, although it seemed to me it was a logical step, the way it was handled. But a major -- this is the first case, I believe, that this issue has been argued. And I know we

have one new member on there, and I'm not sure if the other members have dealt with this particular case before. And I'm also a little confused about -- I know we have -- this is also being tied, and the Attorney General just asked -- a representative asked that this issue be linked with Mr. Cunningham's case. And so it leaves a little confusion in my mind relative to the precedent-setting nature of this particular case.

What this issue for the non-attorneys, I think, revolves around really is, the Sacramento II case is the basic issue on unemployment insurance -- the carrot and stick. And in that particular case, the issue was, if the state did not require public agencies to be covered by the Unemployment Insurance Act, the state would then lose a tax exemption for private employers. And the courts ruled that that stick, if you will, was so great, that the state had no alternative.

And that is exactly what is being argued here by local government, that the potential ability to have access to state funds is too big of a stick to not carry out and comply with the requirements of the SEMS Act. And that's really, I think, you know, the guts of the issue.

So I think from local government's standpoint, it's pretty clear, I think, for a long time that this Commission has been given the responsibility to interpret the Constitution. That is your job, as I recall in all

of the discussions that have gone forth. That it was created because the Commission that preceded this did not feel it had the discretion to interpret the Constitution. It felt it was restricted.

And in 1985, legislation was passed to give this Commission the authority to apply the Commission to state mandates. And so I think that in looking at issues, that is where you look to, as you look to the Constitution: What does the Constitution require you to do in terms of determining what is or what is not a state mandate.

So I guess there's two issues. One, I just wanted to make those comments; but secondly, I was also a little bit confused about whether or not the relationship between the decision that would be made today and whether or not this decision or this discussion would also then be continued in conjunction with the school site safety -

MR. CUNNINGHAM: School site council.

MR. BURDICK: -- school site council case, and I guess that's -- I have both, a statement and a question.

CHAIR PORINI: All right, comments from members?

MEMBER SHERWOOD: Question. Allan, you mentioned the first time this is being argued relative to the carrot-and-the-stick approach, I assume is what you

meant?

MR. BURDICK: Yes, as it applies to the local government, this is --

MEMBER SHERWOOD: Because in the past decision-making process, it seems like that element maybe had been brought up on occasion, but the consequence of not having -- that the voluntary versus just strictly a mandated aspect is what was determined.

MR. BURDICK: That's right.

MS. JORGENSEN: If I can speak to that issue.

MEMBER SHERWOOD: Okay.

MS. JORGENSEN: I can wait until you're done.
I'm sorry.

MEMBER SHERWOOD: And this is what I get back to also, because I hesitate to move from our prior experience in judging these cases into the arena you're talking about, relative to local issues, without a full hearing or a full discussion of this matter, possibly in much more detail.

But as I sit here today, looking at this case, I'm looking at it from a "voluntary versus a mandated" point of view, and I find difficulty in getting past the voluntary component of this, realizing what part of the argument here is relative to "carrot and the stick." But I'm looking at it still at this time as a voluntary program.

The issue you're talking about to me is a much

broader issue, that I don't -- well, and it's difficult to say how members have looked at this in the past.

MR. BURDICK: Yes, I would just comment in response to that, Member Sherwood; that, you know, I think in the staff's analysis, the term "carrot and stick" was used, which exactly was -- I think was a very good term. I think it was the most appropriate. And I think that's really a key part of this issue.

And as I say, I think this is the first time that I recall that it has been dealt with really this directly as it relates to a particular local program. And so it's something that I thought staff has singled out, and that was going to be the central part of the discussion.

And the two parts -- one, as I understand it -- and I must apologize for not being as -- reading the staff analysis and detail and all the letters all the way through, I've followed them, I have read them, but I have not really studied this particular matter to be in a position to testify if I had planned to today -- but it seemed to me, that was the issue that was in front of the Commission in many regards is: Does that provision, which originally came up in Sacramento II, relating to the federal government, does that apply to the state as well as to the federal government? That seems to me to be the central issue.

MEMBER SHERWOOD: Well, that may be the issue

that was brought up by staff, but that does not necessarily mean that the Commission feels that is an issue relative to this situation. It could be --

MR. BURDICK: And that is true, yes.

MEMBER SHERWOOD: -- more of a -- is it voluntary, do you mean it's voluntary, was it a mandate from the state to local government to participate in these programs. But I see where you're coming from.

MS. JORGENSEN: And I did want to speak on the issue.

It's my understanding that similar issues have come before the Commission. I wasn't here at that time, but I defer to Paula to discuss this issue.

MS. HIGASHI: The carrot-and-stick analysis was done most --

MEMBER SHERWOOD: I'm sorry?

MS. HIGASHI: The carrot-and-stick analysis was done most recently on various parts of the special ed test claim. And that's where you may be remembering it from.

MEMBER SHERWOOD: Yes, but that was relative --

MS. HIGASHI: It was all federal --

MEMBER SHERWOOD: -- to the federal through the state.

MS. HIGASHI: -- mandates; correct.

MEMBER SHERWOOD: Correct.

MS. HIGASHI: Correct.

CHAIR PORINI: Other -- yes, Ms. Faulkner?

MS. FAULKNER: If I could add one thing. I know this body has looked at dictionary interpretations in the past, and I think we're revolving around the definition of "incentive," "financial incentive," as opposed to "consequence" or "penalty." And so out of the Random House dictionary -- and I've brought that along -- or I wrote the definition -- I brought that along, though -- is, it says, "Incentive is something that incites or tends to incite to action a greater effort." So then we get around to looking at "incite" and all that.

But right below that definition is the definition of "incentive pay," and that says, "Additional pay, a higher wage or bonus to promote productivity."

So we have problems with this being an incentive because we don't see anything additional. We get nothing additional for efforts of complying with SEMS.

Whereas if you looks at the definition of "consequence," it says it's the "effect, the result, or outcome of something occurring earlier." And we see this as a consequence for not complying with SEMS.

MEMBER BELTRAMI: It's an added hurdle to apply for the funds that you could apply for before without that hurdle.

MS. FAULKNER: Exactly.

MEMBER GOMES: It seems to me to be a little even simpler than that, back to what Member Sherwood was saying, it's like whether or not this is a program that's mandated by the state that the locals participate in. And to even go further to talk about incentive pays and consequences for penalty doesn't really seem to be the point.

Our job is to decide whether or not there's a cost mandated by the state.

CHAIR PORINI: I think I am compelled by the discussion of "voluntary" versus "mandate" also. And I don't think that, within the statute, it talks about "penalty," either. And I think that Ms. Faulkner pointed out, as did Ms. Gomes, the issue of access to the funds.

And, you know, "access," in my mind, is somebody -- it's the front door to the building. It doesn't necessarily mean that you get the funds. So I think -- you know, I still see this as voluntary versus mandate, and not a penalty, but whether or not you have access to the funds.

MEMBER BELTRAMI: But aren't you adding another door for access?

CHAIR PORINI: Well, but there are a lot of doors for access all the time.

MEMBER BELTRAMI: No, but if I can't get to the second door because I haven't -- I've decided in my independence not to follow the rules --

CHAIR PORINI: Ah, but you've decided. I didn't decide that for you.

MEMBER BELTRAMI: Okay.

MR. CUNNINGHAM: But, again, the question was, was that a true choice.

MR. BURDICK: Give me your money or not give me your money when you've got a gun. Is that a choice?

MEMBER BELTRAMI: Well, Madam Chair, what do these things mean to you? Section 2443(a) requires local governments to use SEMS in order to be eligible for state funding of response-related personnel. Okay.

Section "umpty-umt" requires applicant to self-certify compliance.

Section "umpty-umt" requires the applicant to have evidence of compliance with SEMS as set forth in the former sections.

Section "umpty-umt" requires local governments to document their use of SEMS, including activities performed pursuant to this.

Section "umpty-umt" requires all local governments within the county geographic area shall be organized in a single operational area.

In some counties, what that has done is taken all the cities, the little, small civil defense -- old civil defense -- now emergency service operations -- and they've decided to coordinate them all into one new authority. Added costs, obviously, another layer of

government that's been created.

Now, maybe those are just guidelines from OES, but they seem to be having some impact at the local level.

And certainly if you have to report all these things -- now, maybe I'm wrong, does OES mean that if I don't want to report to you, I don't have to report to you under SEMS?

MR. McKECHNIE: Sure.

MEMBER BELTRAMI: Give me a break.

MR. McKECHNIE: If you don't want to join SEMS, you don't have to.

MEMBER BELTRAMI: Yeah, right. Okay, well, that will be interesting.

MR. CUNNINGHAM: How often does that happen?

MR. McKECHNIE: But, you know, these things are pretty logical kinds of events.

MEMBER BELTRAMI: Well, they were logical before SEMS.

MR. McKECHNIE: That's right; and they should have been doing them before SEMS, if they weren't under the emergency plan.

MEMBER BELTRAMI: Well, here we go again. They should have been doing it, and so now we'll ensure that they do it.

MR. BURDICK: Yes, I think this gets back to the main issue, and I guess, two things. One is to

comment earlier on the Chair's position on the firehouse. The locals would have had that and will have that, and believe they should have that. They just like to do it the way their constituents and those people who think they should do it, at the local level, not the way the state tells them. And that's the issue here.

In this particular case, OES has said, "This is how you shall do it" and took the discretion away from local government in how they want to do it. And that's the issue. It's not whether it's good or bad.

We also have to assume, I think, as we reminded people, that all legislation is good legislation. It's to improve things, to make things better. That's why we pass laws. We pass laws to make things better.

We're not saying this isn't better. We're just saying now, we have to do it the way that the state tells us to do it; or if we don't, there is a large stick over our head which we think, from our standpoint now constitutes a mandate.

So it's not an issue of whether we were doing it before or how we're doing. It is now -- it is a prescribed way that we have to do it. And to the extent that that does result in some increased costs, you know, we're not saying that we're not -- you know, people are going back and looking for paying for firefighters and other kinds of people. We're just saying that we had to go through and make some changes and do things

differently now because you've told us you want to do it that way; and as a result of that, we have incurred some costs that were mandated by the state.

MEMBER GOMES: But that's if you choose to participate in the program.

MR. BURDICK: And we're saying, we have no choice.

MEMBER BELTRAMI: Did I understand you to stipulate that all laws are good laws?

MR. BURDICK: I'm saying, that is the purpose that the Legislature passes them is that theoretically that they are supposed to be good.

MEMBER BELTRAMI: Okay.

MR. BURDICK: And that should not weigh in any way whatsoever whether something is a mandate or not a mandate, whether it's a good or a bad program in somebody's eyes. We should theoretically believe that every law was done for the purpose of improving society, whether we happen to agree with it or not.

CHAIR PORINI: Mr. Sherwood?

MEMBER SHERWOOD: Allan, but up front, it is still a voluntary decision. And to take it a step further is the issue here, which gets back to the federal carrot-and-stick approach. And in my particular case, I don't see -- in this case, I feel like I can't make that decision to go beyond what has been, I think, the normal practice, and maybe even our mandate here, to determine

whether this was a voluntary program or not without going off into these issues of the "carrot and stick" or the financial incentive, however you want to define it. That's a pretty big step to take, I think, if we were to do that today.

MR. BURDICK: Well, it was my -- first of all, I should comment again, as I did, that because of the details on the first part of the mandated activities, I think that San Bernardino County believes and the other counties believe that it is. I don't -- I haven't looked at it enough to argue that issue.

On the other issue, which I saw the carrot-and-stick issue, which I thought was going to be the centerpiece of, you know, part of the discussion; and then the question was whether or not you, as a administrative body, had the right to interpret -- you were bound -- I'm not sure of the -- I don't want to put words in the Attorney General representative's -- to try to paraphrase that exactly -- but essentially, as I say, this body was created to interpret the Constitution. And that's your purpose, is to interpret what this Article XIII-B, section 6, what does it mean and also under those provisions. And that's why I believe, if you get to the pieces that relates to the carrot-and-stick provision, that the stick in this particular case, the local agencies, that -- every local agency I have talked to felt they comply, it would be interesting to see how

many agencies have not felt they were compelled to do it.

And I can tell you that I don't -- there are few, probably, mandates that every single local government complies with, as there are mandates on state agencies that not every single state agency, I'm sure, complies with.

CHAIR PORINI: Ms. Gomes?

MEMBER GOMES: I'm just a little leery about going beyond the voluntariness of it. Because if we do find -- it is voluntary and that's how the program is set up. And if we take that step beyond that and say they're costs mandated by the state, I just have a fear of it opening a door to a lot of other issues that could come before the Commission on that particular point. So it just -- I don't know.

CHAIR PORINI: Ms. Faulkner?

MS. FAULKNER: Well, and we would be very worried about the, quote, unquote, "slippery slope" that this would also say if this was truly deemed to be an optional program. For example, if the state decided to withdraw vehicle license fees or sales tax from counties, unless they performed "X" service, this would be the parallel that would happen if this were truly held to be an option.

CHAIR PORINI: Mr. Beltrami?

MEMBER BELTRAMI: See, that's where I don't think it's a carrot and stick, because where are they

getting these carrots. It isn't like they're saying, "Sign SEMS and we'll give you more." It's saying, "You won't get what you have been at least eligible to apply for." So I'd call it something else: An "avocado and stick."

CHAIR PORINI: Mr. Burdick?

MR. BURDICK: I would just say as a final comment, that I think this is exactly why the Legislature did this. It was their attempt to try to get around the mandate process as they do in so many other creative ways, to put language into bills.

And I think the courts have told you clearly, you do not need to take the language of what the Legislature tells you when something is or is not or why, that does not bind you in your decision-making process. It's clear that you have the authority to make your own decisions, the Legislature, in enacting those laws.

And this, as I would see it, is just another one of those disclaimers they put in there to attempt to get around the process of saying, "We have to put money in this bill, and this is a reimbursable state mandate."

I know that under Sacramento II -- under Sacramento I, which preceded it, obviously -- the decision was in favor of local government. And at that time the representative of the legislative analyst said, if that decision held, versus the other way, that the carrot and stick did not work, that, in a sense, then

local government would have the option of doing that, and making penalties to say, "Do this or we won't do something," and they at that time were threatening to use that.

Then Sacramento II came along and said, "Whoops, no, it's the other way around; that it is a mandate if you use the carrot and stick. And we didn't see the Legislature using this as a regular basis.

So I think this is just simply an attempt by the Legislature to try to get around, from their perspective, when it went through their legislative process, of having to fund this particular measure.

I don't think it allows them to get around this Commission's process, because I think you have the authority to say, "Legislature, you can say what you want to say; but if it's inconsistent with the Constitution, then you're wrong."

MEMBER BELTRAMI: I'm wondering if the Commissioners would be willing to continue this to the next meeting, so we can have Commissioner Steinmeier present then.

CHAIR PORINI: What's the desire of the Commission?

Why don't we try this, Mr. Beltrami: Is there a motion that anyone wishes to make on this item?

MS. FAULKNER: We would certainly appreciate someone to move for a continuance.

MEMBER GOMES: Well, I would like to make a motion that there are no costs imposed by the state.

CHAIR PORINI: All right, we have a motion.

Do we have a second?

MEMBER SHERWOOD: I'll second that motion.

CHAIR PORINI: We have a motion and a second before us.

May we have roll call?

MS. HIGASHI: Mr. Beltrami?

MEMBER BELTRAMI: And the motion again, Madam Chairman?

MEMBER GOMES: Is there are no costs mandated by the state.

MEMBER BELTRAMI: No.

MS. HIGASHI: Ms. Gomes?

MEMBER GOMES: Yes.

MS. HIGASHI: Mr. Sherwood.

MEMBER SHERWOOD: Yes.

MS. HIGASHI: Mr. Suter?

MEMBER SUTER: No.

MS. HIGASHI: Ms. Porini?

CHAIR PORINI: Yes.

MS. HIGASHI: It's a 3-2 vote?

MEMBER BELTRAMI: Madam Chairman, I would move to continue this item until the next meeting.

CHAIR PORINI: Well, this particular motion -- none of our motions have passed.

MS. HIGASHI: Correct.

CHAIR PORINI: We simply have not had -- I would like to ask staff if they can frame the analysis in a different manner. I think that having this bifurcated has complicated rather than assisted. And I don't exactly know what direction to give you on that, but I really sense that we have been unable to come to a consensus on this bifurcated process.

MS. JORGENSEN: So is it that the issue really should be one issue, whether it's a new program mandated by the state? And then with that, you do have to go to the analysis as to whether or not something is a new program or a higher level of service. And then that's traditionally the way we've done the analysis. But if you want, the remaining ones to go to this issue, I guess, that would be making an underlying assumption, to get to the point that it was a new program or a higher level service.

CHAIR PORINI: Well, maybe other members have a feeling about it. I just felt that it became very complex, bifurcated. And I think that the end result is that we've not been able to reach a conclusion about it.

MR. CUNNINGHAM: Madam Chair, is the issue how you determine whether something is voluntary or not, what test you use?

CHAIR PORINI: Well, I don't think so. I think we need to have staff go back and spend some time

thinking about the issue.

MEMBER BELTRAMI: Can you work on that?

MEMBER GOMES: Oh, yes.

CHAIR PORINI: All right. Let's take a five-minute break, please.

(A recess was taken from 11:21 a.m. to 11:37 a.m.)

CHAIR PORINI: We'll go ahead and start. We moved back to item 5.

MS. HIGASHI: This is a test claims on School Crimes Reporting II.

Are we going forward?

MR. APPS: Madam Chair?

CHAIR PORINI: Yes, Mr. Apps?

MS. HIGASHI: David Scribner will present this item, but Mr. Apps wishes to speak first.

CHAIR PORINI: Please.

MR. APPS: I appreciate being taken out of turn.

In your binder, at page 13, under tab number five, is a letter from the Department of Finance, in which we took issue with certain of the alleged mandates being mandates, certain activities, through either a miscommunication or whatever. The person or the persons that would be best able to respond, and respond to any questions you might have and to present our case, are not available at this time. And so I would request that this matter be held over for one more month, to the February

meeting.

CHAIR PORINI: Are the claimants amenable to that?

MR. CUNNINGHAM: No, we're not. We would like this to go forward. The comments in the letter -- it was a May 1998 letter. Both the claimants and the Department of Education came up with rebuttal to that. That's been considered by the staff. The staff disregarded those comments. And the staff analysis has been available for comment for some period of time. I believe it was first issued in early December. And there were no comments filed at that point by the Department of Finance.

I would ask that the Commission go forward and consider and approve this item.

CHAIR PORINI: Members, can we hold this item over or do you want to proceed without the person who can respond to questions?

MEMBER GOMES: Personally, I would like to have the person who's going to be responding to questions present. That's my thought. So I would tend to say, put it over until next month.

CHAIR PORINI: Do you agree, Mr. Beltrami?

MEMBER BELTRAMI: Yes.

MR. APPS: Thank you.

CHAIR PORINI: All right. We'll put it over.
Thank you.

MR. APPS: Thank you.

MS. HIGASHI: Commission Members, this brings us to items 8 and 9. Both of these items are related to the subject of special education. Item 8 is the Proposed Statement of Decision on the dismissal of the withdrawn portions of the special education test claim filed with the Board of Control by the Santa Barbara County Superintendent of Schools on October 31, 1980.

As you know, the Riverside County Superintendent of Schools also filed a test claim on special education in 1981.

Both claims were denied, and ended up in the Court of Appeal in the case, Hayes v. the Commission on State Mandates. In 1992, the Hayes court remanded both claims back to the Commission to conduct further proceedings.

In 1993, Riverside initiated consideration of its test claim. In 1995, the Commission adopted a procedural Statement of Decision, authorizing the filing of supplemental claims by July 31, 1995, from any school district requesting reimbursement for additional program areas or fiscal years not requested by Riverside.

In November of 1998, the Commission adopted two statements of decision on the consolidated special education test claim filed by Riverside and joined by supplemental claimants. On that same day, the chairperson assigned two program areas to a hearing officer to prepare proposed statements of decision

because they had resulted in tie votes.

One of the adopted decisions addressed allegations raised by the Long Beach Unified School District. In that decision, the Commission determined that Education Code section 56026, special education for disabled children, ages 3 to 5 and 18 to 21, was not before the Commission as part of the consolidated test claim because it was neither alleged by Riverside nor timely joined or consolidated to the Riverside claim by a supplemental claimant. The Long Beach Unified School District requested reconsideration of its decision.

On September 30th, 1999, the Commission heard Long Beach's request. Long Beach contended that the Commission failed to hear and decide the Santa Barbara test claim or special education services for disabled children, age 3 to 5 and 18 to 21.

At that hearing, the Commission was presented with two options: Grant the request for reconsideration and allow Long Beach to present its argument on the merits at a subsequent hearing; or, two, deny the request for reconsideration, and allow the Commission to schedule a separate hearing to dismiss the Santa Barbara claim under common law principles.

A motion on option one failed to obtain the super-majority vote and, thus, failed. A motion on option two obtained a tie vote and, thus, failed.

On October 27th, Commission staff issued a

letter to Santa Barbara and to all interested persons, providing notice that a hearing to dismiss the 1980 claim was scheduled for today and to provide an opportunity to file comments.

However, on November 26th, 1999, Santa Barbara filed an application to withdraw all of its test claim under section 118308 of the Commission's regulations, except for that portion requesting reimbursement for special education for students 3 to 5, 18 to 21, as provided by Ed. Code section 56026.

Santa Barbara also amended the claim by substituting Long Beach Unified School District as the claimant for the remaining portion of the claim.

On December 8th, 1999, Commission staff issued a letter to parties regarding Santa Barbara's request. The letter explained that section 1181 of the regulations authorized the claimant to amend the test claim by the addition of substitution of parties and, thus, Long Beach is now the test claimant on the 1980 claim on Education Code section 56026; that there were now two test claims which included that code section. And, thus, to ensure the fair, complete, and timely consideration of both claims, I notified the parties of my intention to consolidate the claims pursuant to section 118306 of the Commission's regulations.

The letter also indicated that within 60 days, pursuant to regulations, any party could take over the

withdrawn portions of the Santa Barbara claim. If no party takes over the withdrawn portions, then the Commission is required by regulation to issue a decision dismissing the claim. Since no school district asserted its right to take over the withdrawn portions of the Santa Barbara claim, the Commission is required to issue a decision, dismissing those portions. Therefore, staff recommends that the Commission adopt the attached proposed Statement of Decision, which dismisses the Santa Barbara test claim, except that portion of the claim requesting reimbursement for special ed services for students ages 3 to 5 and 18 to 21.

If, however, the Commission disagrees with the staff analysis and wants to vote on a motion to dismiss the entire claim, the Commission may direct staff to notice a hearing on the dismissal of the entire claim to be scheduled on the next agenda.

Under common law principles, the action would require the claimant and interested parties to show cause why this test claim should not be dismissed.

Will the parties please state their names for the record?

MS. SUK: Kyungah Suk, from -- I'm sorry, Kyungah Suk from the Attorney General's Office on behalf of the Department of Finance.

MR. STONE: Dan Stone from the Attorney General's Office, also for Finance.

MR. MULLENDER: Joseph Mullender for Long Beach Unified School District.

CHAIR PORINI: All right who wants to begin?

MS. SUK: I could begin, please, Madam Chairperson.

CHAIR PORINI: Sure.

MR. SUK: Actually, at this time I would like to mistake some background comments addressing both items 8 and 9, abuse these issues are intertwined; and they both deal with Santa Barbara's 1980 test claim.

I'd like to do remind the Commission that no matter how you look at Santa Barbara's claim, one thing remains clear, and that should be at the forefront of each member's mind, and that is this: This Commission has already issued a Statement of Decision, finding that Santa Barbara's claim, and in particular, the 3 to 5, 18 to 21 age claim, is not properly before this Commission. And, thus, it is not part of this special education claim.

We're not here today to argue the issue of whether or not Santa Barbara can or cannot withdraw its claim that was filed 20 years ago, nor are we here today to decide whether Long Beach Unified School District can substitute itself over the 3 to 5, 18 to 21 age claim; nor can we here to decide whether the executive director of the Commission on State Mandates has authority to consolidate similar test claims at an abstract level.

The staff's recommendation leads you to believe that these are the reasons why we are here today. But this Commission must stay focused on the real issue. The real issue before the Commission is how to properly dismiss Santa Barbara's claim regarding special education services after this Commission previously decided that the Santa Barbara's claims were not part of the current special education proceedings. The basic facts are undisputed and have not changed.

It is undisputed that back in September of 1996 this Commission heard Long Beach's allegation that Santa Barbara's claim was still alive; in particular, with regard to the 3 to 5, 18 to 21 age claim. This Commission found that the claim was not properly before the Commission as part of the consolidated special education test claim because it was neither alleged by Riverside, nor timely brought by any supplemental claimants. The Commission's decision was adopted in a Statement of Decision dated November 30th, 1998.

Now, unhappy with the Commission's decision, Long Beach tried to revive Santa Barbara's claim by seeking a reconsideration of the Statement of Decision. As the Commission staff read earlier, this Commission considered the motion to grant the request for reconsideration at the September 1990 hearing. This motion failed. Since the motion for reconsideration failed, the Statement of Decision finding that Santa

Barbara's claims are not properly before this Commission stands.

We need to remember that this is the final decision by the Commission, and this decision was never reconsidered nor was it reversed.

End of story.

The only thing -- the only matter that is left is how to technically properly dismiss Santa Barbara's claim which was filed in 1980. Thus, at the hearing in September, the staff was directed to notice a hearing to dismiss Santa Barbara's claim. The transcript is clear that the Commission was seeking to dismiss Santa Barbara's claim, and the Commission wanted to do it procedurally correctly, by noticing the dismissal to interested parties, entertain any objections, and determine if good cause existed to dismiss Santa Barbara's claim.

Now, as you know, October 27th, 1999, the Commission staff sent out the letter notifying the interested parties of the dismissal of Santa Barbara's claim. And the hearing was set for today, to listen to the for-cause issues.

Now, after receiving the letter, Santa Barbara, from whom we haven't heard in almost a decade, states that it will now withdraw its claims but for the 3 to 5, 18 to 21 age claim. Further, having failed twice to revise Santa Barbara's claim, Long Beach now seizes this

opportunity to substitute itself over the age claims.

Santa Barbara and Long Beach's action presupposes that Santa Barbara's claim is somehow still before this Commission, which clearly is not the case. Not unless the Statement of Decision issued by this Commission, dated November 30th, 1998, has been reversed.

Staff's recommendation finds that Santa Barbara can withdraw its claims and Long Beach can substitute itself in Santa Barbara's place, and that the two age claims can be consolidated. This finding is based on a false premise that the Santa Barbara's claim is still pending before this Commission as part of the special education claim. This is not the case.

The issue here isn't is whether Santa Barbara's claim is still pending. The issue is whether Santa Barbara's claim was properly alleged before this Commission, after this Commission adopted the procedural Statement of Decision back in 1995.

The Commission found that the claim was not properly brought before the Commission, and Santa Barbara's claim is, thus -- is dead. If the claim is not properly before the Commission, it is not alive, nor is it pending for further action.

So, now, having said this, and in light of the fact that this Commission has already decided that Santa Barbara's claim was not part of the special education test claim, the only thing left to do is to, one, dismiss

the claim; or two, withdraw the claim. And since Santa Barbara's claim has -- Santa Barbara has already noticed its withdrawal and no objection having been made, we will not oppose the withdrawal of Santa Barbara's claim. However, we seek that the 3 to 5, 18 to 21 claim be dismissed.

Thank you.

CHAIR PORINI: All right, Mr. Stone, did you wish to comment?

MR. STONE: No, nothing further. Thank you.

CHAIR PORINI: Mr. Mullender?

MR. MULLENDER: Well, I'd say that, you know, the dismissal of the age limit claim is really not on the agenda for today. First of all, as the staff has pointed out in their analysis, there is no motion to dismiss the age limit claim.

The Attorney General has argued for that, but there -- for dismissal, but there is no motion and it's not on the agenda. So I would say that the claim shouldn't be dismissed for the reasons we have stated in our papers. However, if the Commission is going to consider dismissing the Santa Barbara age limit claim, it should be noticed for a subsequent hearing and put on the agenda.

CHAIR PORINI: Mr. Beltrami?

MEMBER BELTRAMI: May I ask Ms. Jorgensen a question, Madam Chair?

CHAIR PORINI: Certainly.

MEMBER BELTRAMI: What was the impact of the Statement of Decision on November 30th of '98?

MS. JORGENSEN: Excuse me, what Statement of Decision -- the original one, in which they ask for reconsideration?

MEMBER BELTRAMI: The one that Ms. Suk --

MS. SUK: It's the November 30th, 1998, Statement of Decision, where the Commission found that Santa Barbara's claim was not properly before the Commission.

MS. JORGENSEN: In the consolidation of the special education claims?

MS. SUK: Right.

MS. JORGENSEN: I wasn't there at that time. But that's my understanding that it wasn't included for the consolidation.

MS. HIGASHI: Let me clarify.

Long Beach had made allegations at the June '96 hearing, I believe it was, regarding the 56026 of the Education Code, including an allegation for special education for students, ages 3 to 5 and 18 to 21. That particular code section was not part of Riverside's filings or the filings of any of the supplemental claimants. The matter was briefed and set for hearing in September of '96, and at that time the Commission made its preliminary decision and determined that those code

sections -- that code section was not before the Commission as part of the consolidated Riverside test claim because it was not alleged by either Riverside or timely joined or consolidated to the Riverside claim by a supplemental claimant.

And throughout that proceeding, I believe Long Beach had argued that it had been part of the original Santa Barbara claim. But prior to that time, the Commission had taken no actions regarding the Santa Barbara claim, nor had it officially communicated with Santa Barbara. So until this last six-month period of time, when the request for reconsideration was filed and after the Commission asked us to notify Santa Barbara, Santa Barbara had not really been communicated with by this Commission, that we were able to find any evidence of.

CHAIR PORINI: Mr. Sherwood?

MR. MULLENDER: I was going to --

CHAIR PORINI: Mr. Mullender?

MR. MULLENDER: I was going to make one statement about what Mrs. Higashi said, is that the statute -- Education Code 56026 was alleged in the Riverside claim and in the supplemental claim of the Grant Joint Union High School District.

MS. HIGASHI: For age --

MR. MULLENDER: Yeah, for the "over age 21" claim.

MS. HIGASHI: Yes.

MR. MULLENDER: It's the same statute. And that was one of the things that we pointed out when we asked the Commission, back in -- well, it was in the summer of '96 -- to hear the Santa Barbara claim. That you had the same statute involved, that they had already ruled on and allowed a mandate on. So I just wanted to point that out, the statute was involved.

MS. HIGASHI: Right, and that's why I said specifically, alleging 3 to 5, 18 to 21, because the Commission did, in fact, approve the "over 21" portion.

CHAIR PORINI: Mr. Stone?

MR. STONE: And if I may elaborate, the fact that the statute was at issue in respect to maximum age, 21 and over, led the Commission to permit Long Beach, once it filed its new claim in 1996, I believe, focusing on ages 3 to 5 and 18 to 21, it permitted Long Beach to be consolidated with the existing special education mandate claim for purposes of briefing and hearing and resolution, because they didn't want duplicating -- duplicative -- redundant hearings.

But the Commission also determined Long Beach was there for two reasons. First, it wanted to essentially substitute itself, and insist that the Commission hear the Santa Barbara claim. And the Commission considered whether the Santa Barbara claim had survived all the various deadlines the Commission had

imposed after remand from the superior court for briefing, for identification of the particular areas that allegedly exceed federal mandates and so forth. And the Commission determined that none of those required steps had been taken by Santa Barbara, by Long Beach, or by any other of the supplemental claimants; and that, therefore, that was not a part of the special education claim with the period going back to 1980.

But Long Beach was permitted to file a new claim with the period going back, I believe, to 1995, and that was consolidated for the purpose of expediency and efficiency.

But the Commission had determined that the Santa Barbara claim did not survive all the various deadlines and filtering mechanisms that the Commission had imposed. That's our point. That's a ruling by the Commission.

And to now, several years later, treat the Santa Barbara claim as if it's still alive -- I mean, we talked at the last hearing, in September, about the claim still being pending in the specific procedural sense, that the Commission had thus far failed to procedurally dismiss it. But it has otherwise, as far as the substance of the claim and any right of subvention, it has been put to rest.

MR. MULLENDER: Can I say something about that?

CHAIR PORINI: Certainly.

MR. MULLENDER: Okay, thank you.

I, frankly, dispute that statement as a statement of fact. The only issue considered in September of '96 was whether or not they should hear the claim because it hadn't been reasserted by Riverside or in a supplemental claim. That was it. There was none of this stuff about Santa Barbara was late and they hadn't done anything. That was not involved. The only question involved was whether or not the Commission was precluded from hearing it because it hadn't been asserted by Riverside and the supplemental claim. And I think if you examine the briefs, you'll find that's true.

CHAIR PORINI: Staff?

MS. HIGASHI: If you would turn to Exhibit A, Bates page 60 -- it starts on Bates page 57 -- it is the Statement of Decision which we're addressing here. And Santa Barbara is mentioned in the historical background portion of this decision; but in terms of the issue and the analysis, it's as I had described earlier and as Mr. Mullender had just reiterated.

CHAIR PORINI: Was that page 57 or 60?

MS. HIGASHI: It starts on page 57; but on Bates page 60 is where the issue starts.

MR. MULLENDER: Paula, you understand, I'm saying none of this happened in September of '96. I agree that --

MS. HIGASHI: Right, but the decision that

was --

MR. MULLENDER: The statement --

MS. HIGASHI: This is the decision that was adopted in November of '98.

MS. SUK: If I may --

MS. HIGASHI: Hence the words "Santa Barbara" are in the background; but in terms of the analysis on this particular issue, it was in the context of the Riverside claim and the procedural Statement of Decision, which was connected to the Riverside claim. And the analysis was done in reviewing the claims filed by the supplemental claimants and Riverside.

MEMBER SHERWOOD: Can I make a comment?

CHAIR PORINI: Mr. Sherwood?

MEMBER SHERWOOD: I think we can say that the Long Beach claim was heard and reheard, and it is dead.

MS. HIGASHI: That's --

MEMBER SHERWOOD: Relative to --

MS. HIGASHI: Whether they were part of Riverside.

MEMBER SHERWOOD: -- 3 to 15 (sic), the 18 to 21, from '95, back to 1980.

MS. HIGASHI: As part of the Riverside claim.

MEMBER SHERWOOD: As part of the Riverside claim.

MS. HIGASHI: Right.

MEMBER SHERWOOD: But what we get back to is,

is the Santa Barbara claim still alive, outside of the consolidated Riverside claim?

MS. HIGASHI: That's correct.

MEMBER SHERWOOD: And that's the crux of the matter here.

MS. HIGASHI: That's how staff views it.

MEMBER SHERWOOD: If it's still alive, then -- and staff, evidently, through its analysis, feels it is alive because it was not addressed in the '85 hearings -- '86 -- or you can't find any historical record of such.

MS. HIGASHI: We can't find any record of any written communications with Santa Barbara.

MEMBER SHERWOOD: Now, I assume you've done a thoroughly examination of those records?

MS. HIGASHI: All the records which we have under our control.

MEMBER SHERWOOD: And you've actually gone through these records?

Where we're at then is -- and what you're putting forward is, that the Santa Barbara -- separate from consolidated, separate from Long Beach -- is still out there and is running down the path, and needs to be -- and, procedurally, we have dismissed it; and legally, we have no other avenue, other than to hear it at this time.

Now, if that's true, of course, then Long Beach has the ability -- or Santa Barbara has the ability to

assign the Long Beach a portion of that claim. And Santa Barbara's indicated they wish to do that. Now, you've given them that authority.

MS. HIGASHI: You have. The Commission members adopting regulations, yes.

MEMBER SHERWOOD: And you've written to them, and they've corresponded where they feel they should be here. So they're willing to dismiss the entire case, other than their claim, other than this one portion. And Long Beach has basically taken over -- wishes to take over that part of the case.

So a lot of discussion about what happened with Long Beach really doesn't matter here. What matters to me is whether it was -- early on, Santa Barbara was considered -- or given the opportunity to be part of the Riverside claim, whether they were informed that the process was taking place, and did they basically pull back and not want to be part of it by their own action. And we don't find any record to indicate that that's the case.

MS. SUK: Could I also make --

MEMBER SHERWOOD: Now, that's kind of how I see this thing, and that's why I'm trying to look at Santa Barbara, and see whether Santa Barbara has really been dismissed or not. If they've been dismissed, then we shouldn't be here. If they haven't been dismissed, then I'm afraid -- or think that staff's analysis would be

correct.

MR. STONE: Member Sherwood, they haven't been dismissed. Staff did search the record to see whether either they had, prior to this most recent document they filed, whether they had withdrawn formally or whether the Commission had dismissed them. And neither of those events apparently occurred.

I did cite, in our most recent filing, our appeal, I cited to the transcript, I believe back in '96, in which Riverside indicated, in hearing before the Commission, that Santa Barbara had, indeed, dropped out, and Long Beach concurred in that. Alan Tibbetts (phonetic) said they lost interest; yeah, they're not in the picture anymore. And that's the same thing we were told repeatedly by Commission staff.

Now, whether there's any record of communication -- written communication, we were told by this Commission staff that the Santa Barbara claim had been abandoned, except to the extent that Riverside added to its itemized list of things.

MEMBER SHERWOOD: Okay, and I read that and --

MS. SUK: And actually could I just point to one thing that will -- that may clarify this issue? If you go to Bates stamp 61, in the paragraph -- the first paragraph, it says in its April 1995, statement, if you could look at it not so much as whether or not Santa Barbara has dismissed or withdrawn its claim; if you look

at whether or not they affirmatively participated in the claim, I think that is the real issue. Because if you read this paragraph, it states, "In April 1995 Statement of Decision, as amended in the July 20th, 1995, Commission ordered claimants at a minimum to initially prepare a comparative analysis of relative state and federal regulations and case law before it would hear the claim." The Commission further required a bunch of other things in order for the claim to be still viable.

And at the end of the paragraph, the Commission added that, "Unless a test claim is filed with the Commission on or before July 1995, such test claim shall not be joined and consolidated with Riverside's present test claim. Test claims that are not joined or consolidated shall be subject to a new test claim filing date."

And, thus, since Santa Barbara did not -- or any other -- none of the other test claimants did not come forward to prepare this initial comparative analysis of relevant state and federal regulations, they failed to participate and to procedurally be part of this special education test claim.

MEMBER SHERWOOD: Now, that makes sense to me.

I'm sorry.

CHAIR PORINI: Go ahead, please.

MEMBER SHERWOOD: But does that necessarily

preclude this -- Santa Barbara's claim that went back to 1980, that was separate from the Riverside?

MS. SUK: Other -- I mean, I remember -- I wasn't here exactly in 1995, but I know that the Commission staff had forwarded notices and letters to test claimants, notifying them that, you know, the Riverside claim would go forward, and that other test claimants could now bring forth any claims at the time that was not covered by Riverside. And none of the test claimants came forward, except for Grant Union, which brought the 18 to 21 test claim, which shows that other test claimants knew they could have brought forward the 3 to 5 and 18 to 21 if they wanted to.

MR. STONE: Grant Union's was 21 and over.

MS. SUK: I'm sorry, 21 to 22. But, actually another district brought the non-RIS transportation from 3 to 5. Now, they would not have brought that test claim if they realized that the 3 to 5 and 18 to 21 was still going forward. Nobody brought it because it was not a test claim that, for some -- for whatever reason, test claimants felt that it was viable to pursue.

MS. FAULKNER: I need --

CHAIR PORINI: We have a historic perspective here.

MS. BERG: I was here in 1985. I was here when Mr. Hori and Mr. Stone finally came together in an effort to move this special education matter forward.

I also have been in contact since 1985 with Santa Barbara, and I have to refute Mr. Stone's allegation that Santa Barbara ever had any intention of withdrawing. They didn't.

CHAIR PORINI: Ms. Berg, is Santa Barbara your client?

MS. BERG: Santa Barbara is a member of the Education Mandated Cost Network, yes. Santa Barbara never had any intention of withdrawing.

If you go back, historically, Santa Barbara made a determination that they weren't going to put -- they couldn't afford to put any more money into the process of litigation. And it was at that point that they moved to the back burner instead of staying at the front burner, with Riverside.

They have never -- and then and there is no documentation that would ever prove that Santa Barbara intended to just evaporate, go away, and give up.

Second point.

CHAIR PORINI: May I ask a question?

Isn't it unusual for somebody to not exercise any -- I mean, not respond to any notices or say anything when they have a test claim that's been filed for that long?

MS. BERG: There were no notices until we began this process again in 1993, when it came finally back to this Commission. There were no notices.

CHAIR PORINI: Did Santa Barbara --

MS. BERG: It was in and out of court.

CHAIR PORINI: Right. Did Santa Barbara respond in 1993? Because when I read these --

MS. BERG: Respond how? I mean, they were happy that we were moving forward, yes.

CHAIR PORINI: Did anyone -- did the Commission know that it was -- that Santa Barbara still had an intent to be involved with --

MS. BERG: The Commission never asked the question. I mean, there was no reason to ask the question. It was a consolidated claim initially, in 1980; and it was always talked about as the Santa Barbara/Riverside claim, until it came out of court the last time, when Hayes was determined. Then it became the Riverside claim. How come? I don't know, but it did.

CHAIR PORINI: Did Santa Barbara --

MS. BERG: Hayes versus Riverside.

CHAIR PORINI: Did Santa Barbara raise an objection at that point in time through you?

MS. BERG: Heavens, no. I mean, because of your own rules and regulations, you say that only one claim will be submitted on an item. In this instance, there were two districts that came forward; and as a consolidated claim, they had overlapping but distinctly different items in the code that they were making reference to in the test claim. That's why their names

were separate, and didn't stand as though -- Michelle Montoya is one that's come before you of late. There were different issues, there were two claimants, and that's the reason there were two claimants.

But I have to point out to you, your own rules and regulations regarding how a claim goes away. This isn't the only claim hanging out in the shadows of your cupboards. There are other claims out there that have not had any activity. But your own rules and regulations determined how a claim can be withdrawn; and that is that the claimant comes forward and says, "We don't want to play anymore." Those are your rules. And that never happened with Santa Barbara.

CHAIR PORINI: At our last hearing, just my own personal comment, it was certainly my intent that this be noticed so we could dismiss it.

MS. BERG: And it was our intent all along, after we left this hearing, to get Santa Barbara active, because we knew they had no intention whatsoever of abandoning their claim.

MS. SUK: But essentially they did, because they substituted out, and they --

MS. BERG: No. Long Beach said, "We'll take it over for you," and they said, "Okay."

MS. SUK: So they really didn't care about the claim.

MS. BERG: Oh, no, no, no. That's an

assumption you must not make. You can't say Santa Barbara didn't care about the claim. Santa Barbara cared enough to say, "Thank you, Long Beach. Put your name in our place."

MS. SUK: My problem is that Santa Barbara never came forward and provided the procedural --

MS. SUK: It doesn't matter. They weren't required to.

MS. SUK: That was required at the time --

MS. BERG: No, they were not required to. They were not required to. You can't prove to me in any place in here that there's a requirement that they come forward. They were already on the books as a consolidated claimant in 1980.

CHAIR PORINI: Mr. Beltrami, did you have a question?

MEMBER BELTRAMI: No, Madam Chair.

MS. BERG: Chicken.

CHAIR PORINI: All right, so staff, it was our intent to notice this for dismissal. You sent out the notices to everyone.

MS. HIGASHI: Uh-huh.

CHAIR PORINI: Santa Barbara clearly got a notice that it was our intent to dismiss, and yet the item is noticed for withdrawal of certain portions.

MS. HIGASHI: That's correct.

CHAIR PORINI: Walk us through that.

MS. HIGASHI: The regulations permit parties to amend a claim before a hearing. In this case, Santa Barbara filed an amendment. The amendment was basically -- it was basically a withdrawal and an amendment.

By doing that, they changed the substance of the matter that was before the Commission, and that was how I viewed it and staff viewed it, as we put the agenda together. And the rights of Santa Barbara were not suspended.

CHAIR PORINI: So we are in a conundrum under our own regulations? All right.

Do members have any questions or comments?

MEMBER SHERWOOD: Could you explain that to me once again? Where are we relative to the options that you put before us today? Am I hearing that these options are legitimate or that we have to notice a different hearing in order to hear these?

MS. HIGASHI: If the Commission is agendaed to adopt a Statement of Decision which would dismiss all of those provisions which Santa Barbara has withdrawn, that action could take place today. If the Commission did not want to take that action but instead wanted the entire claim to be agendaed for dismissal, then we would have to notice it that way and notify under common law principles -- Pat, help me out here.

MS. JORGENSEN: Yes.

MS. HIGASHI: It would be outside of our regulations.

MS. JORGENSEN: You need 60-days hearing.

MS. HIGASHI: It's different from our regulations. It's not covered by our regulations; because what we operated under, our existing regulations here.

MEMBER SHERWOOD: What's before us today, you feel is correct?

MS. HIGASHI: It's correct, given our current regulations which were adopted last June by this Commission.

MS. SUK: If I could just make one comment. If the options are correct, then you still have a problem because you have a Statement of Decision out there, stating that the Santa Barbara claim is not properly before you.

MS. BERG: No, that's not what that --

MS. HIGASHI: That's not what that decision says.

MS. BERG: That's not what that decision says.

MS. SUK: I have a copy of that decision.

MS. HIGASHI: For 3 to 5, 18 to 21 as part of the Riverside claim -- was not part of the Riverside claim.

MS. BERG: Right.

MS. HIGASHI: The consolidated claim. And that

was because they came to the hearing after the July 31, 1995, filing date to make those allegations.

MS. SUK: What about your July 20th, 1995, Statement of Decision, where the Commission stated that, at a minimum, a comparative analysis had to be prepared before the Commission would hear that claim? I don't believe that Santa Barbara has ever made that analysis.

MS. BERG: That remark applied to Long Beach.

MS. HIGASHI: That procedural Statement of Decision, the one that was the April and July decision --

MS. SUK: 1995.

MS. BERG: Right.

MS. HIGASHI: -- applied to the Riverside claim that was initiated by the Riverside filing of briefs back in '95, as I understand it.

MS. BERG: And Long Beach's participation as a representative on that topic, within the Riverside claim --

MS. SUK: No.

MS. BERG: -- that's what that whole thing was about.

MEMBER GOMES: It's my understanding from the September hearing, that we were putting this on calendar to --

CHAIR PORINI: Dismiss.

MEMBER GOMES: -- entertain the dismissal of the entire claim. And now, since that's not happening

and -- I would tend to ask staff to have a noticed hearing to do just that, rather than piecemeal it out the way that this is put together as it is. That's just a suggestion.

MR. STONE: If --

MEMBER BELTRAMI: Another way would be --

MEMBER GOMES: That way we could hear more about that --

MEMBER BELTRAMI: -- to piecemeal it and make sure that we kill something here, and then, you know, act on it. I mean, it's sort of --

MEMBER GOMES: And what would that do? Would that put the Commission in a spot where, okay, are we going to be acknowledging that claim and not have it be up for dismissal, the remaining part, if we just go ahead with the withdrawal portions? Or how would that work?

MS. JORGENSEN: If we go ahead with the withdrawal portion, that's what's before the Commission right now, the withdrawal. It's an opportunity for someone to come forward, to see if they want to -- since it is essentially a class action, it is a hearing where they should have an opportunity to come forward and say why it should not be dismissed, and that's the reason why you have the hearing. It's due process.

So since we have the fact that a large portion of it has been withdrawn, that's really what's before the Commission right now.

For the other portion, with the withdrawal and substitution, all of that is correctly done within our regulations. So staff didn't do anything intentionally to try and piecemeal something. It's the way -- it's what happened --

MEMBER GOMES: No, no, I understand.

MS. JORGENSEN: No, and I'm saying, so what happens there, then if the Commission wants to notice a hearing as to whether or not the Santa Barbara claim on the 3 to 5, 18 to 21 portion should be dismissed, then you need to notice a hearing under in an. And you can do it under the common law principles that it's been stale. But there's nothing in our regulations that allow us to dismiss it, so we had to look at the common law principles and then due process requires 60 days notice.

MEMBER GOMES: So six and one half --

MS. JORGENSEN: No --

MEMBER GOMES: -- because we could do it both ways?

MS. JORGENSEN: You could do one piece today. You could get that taken care of, unless there's someone who wants to come forward to indicate why they don't think it should be dismissed and then that would be taken care of. We'd have to give notice for the hearing on the portion.

MS. HIGASHI: 60 days?

MS. JORGENSEN: 60 days.

MS. GOMES: Okay, just so I understand how
this --

MS. JORGENSEN: Right. It's procedural. It's
due process.

MEMBER BELTRAMI: Or you would have to give
noise for the whole item to be heard.

CHAIR PORINI: Mr. Sherwood and then
Mr. Stone.

MEMBER SHERWOOD: I would just like to indicate
I would like to move ahead with at least addressing the
one piece, and then address the other piece at another
hearing.

CHAIR PORINI: Mr. Stone?

MR. STONE: I was going to indicate that in
light of the fact that this dismissal has essentially
been split into two pieces, we have no objection, since
no one is disputing that the waived portion should be
dismissed. That would be convenient to use this
opportunity to dismiss that portion.

And then we would request that the substitution
and consolidation orders by the executive director would
be overruled, and that the remaining part of the Santa
Barbara claim be set as I thought the Commission asked
last time, be set for a hearing on dismissal.

CHAIR PORINI: All right, does somebody want to
make a motion?

MEMBER SHERWOOD: I would make that motion.

Could we put that in words?

MS. HIGASHI: For the Statement of Decision?

MEMBER SHERWOOD: For a Statement of
Decision --

MS. HIGASHI: On item 8?

MEMBER SHERWOOD: Right. But --

MEMBER BELTRAMI: To adopt --

MEMBER SHERWOOD: -- basically to adopt your
recommendation here, except when we look at the portion
of 3 to 5, 18 to 21 issue, that that will be brought
forward at another time and addressed.

MS. HIGASHI: Okay.

CHAIR PORINI: For dismissal?

MEMBER GOMES: For dismissal.

MS. BERG: Is that an appropriate behavior with
your own rules and regulations?

Currently, the only way a claim can be
dismissed is for the claimant to come forward to this
Commission and make that request. You don't have a
regulation that allows the Commission to just arbitrarily
decide to dismiss a claim.

CHAIR PORINI: Well, then why were we able to
make the motion to dismiss Santa Barbara's claim?

MS. BERG: Because they have made that request.

CHAIR PORINI: No, they've withdrawn. But we,
last month, said that the way to dismiss a stale claim --

MS. BERG: And we did not agree with you at

that point in time, either.

MS. HIGASHI: And that was -- the statement was made on the basis of, since there had been no withdrawal filed, there was a common law procedure that could be used. And what happened in between that notice going out and today, is that Santa Barbara withdrew and exercised its rights under the regulations.

MS. BERG: Right.

MS. HIGASHI: And so the situation is different --

MEMBER BELTRAMI: Does counsel agree with Dr. Berg's comment?

MS. JORGENSEN: Well, the point being that it was originally noticed for everything, and the fact that there was the issue of whether it was stale. And there are -- it's a common law principle, even though we don't have it in our regulation where you can determine if it's stale. But, again, it's an opportunity to be heard and all the parties can come forward.

MEMBER BELTRAMI: She's saying whether it's stale or not, unless the proponent raises the issue, that we don't have that authority under our rules. Now, are we going back to common law --

MS. JORGENSEN: Under our regulations, we don't.

MEMBER BELTRAMI: -- or is that it?

MS. JORGENSEN: Under common law we do. That's

the question. Under common law, we do. But the fact being that it took a while -- I mean, that's part of the issue. That's part of the hearing that we would have, is it appropriate when some action has taken place sometime prior to the motion for the -- the action for the hearing, the noticed hearing.

MS. BERG: But my point stands, does it not, that under the current rules --

MS. JORGENSEN: What has been done is correct, under the current rules.

MS. BERG: Thank you.

MS. JORGENSEN: I guess the only issue being, that the time elapsed.

MS. BERG: The common law, I'm certainly out of my element. I am not an attorney, and I can't even respond to that but --

MEMBER SHERWOOD: Well, now, where are we? The motion is the vote to approve the dismissal, which is an agreement with Santa Barbara?

MS. BERG: Right.

CHAIR PORINI: Dismissal for sections that Santa Barbara has withdrawn.

MEMBER SHERWOOD: Withdrawn, correct.

With the other remaining issue to come before the board again?

MS. HIGASHI: Right, to set it for a future hearing.

MEMBER BELTRAMI: For dismissal?

MEMBER GOMES: Not for dismissal, though.

I thought that's what Pat was saying, that we couldn't --
since they've stepped forward to reinstate --

MEMBER SHERWOOD: For discussion.

MEMBER GOMES: -- reinstate the claim, that
that's not a viable option to talk about dismissing the
portion that's remaining.

MS. BERG: Right.

MEMBER GOMES: That's what you're saying.

MS. BERG: That's what I'm saying.

MEMBER BELTRAMI: But I don't understand our
staff to say that. You're saying we can set it for
dismissal based on --

MS. JORGENSEN: I'm saying, we had originally
set it for dismissal based on staleness. There's the
concept of the staleness. It was stale.

MEMBER BELTRAMI: Right.

MS. JORGENSEN: But I think when you're going
to make a determination as to whether something is stale,
you have to look and see what's happening. And we see
the facts here, that something has been done; the parties
have moved forward. So that's part of the consideration
of the hearing that we're to have on it.

CHAIR PORINI: I think we're asking a different
question. We're asking that if we take action on the
motion to dismiss the portion that Santa Barbara has

withdrawn, is it appropriate for us to notice dismissal of the section that Long Beach is attempting to take over?

MS. JORGENSEN: That's my answer. I believe it is, since we had already sent out the original notice, and that's part of the issue of what you're going to consider, because an original notice did go out to dismiss everything, under common law principles.

But this brings in another factor of what you need to consider. So it's a consideration, what has happened here. It's shown that, well, maybe they don't believe it's stale. But we had originally sent out a notice --

MEMBER BELTRAMI: We'll decide that at the testimony next hearing.

MS. JORGENSEN: Yes, right.

MEMBER GOMES: Would it not be --

MEMBER BELTRAMI: It's still set for dismissal.

MS. JORGENSEN: It can be set for dismissal, correct.

MS. HIGASHI: And that's what Mr. Sherwood's motion.

MEMBER GOMES: Do that all at once?

MS. HIGASHI: Right. But that's what Mr. Sherwood's motion was.

MEMBER BELTRAMI: That's what the testimony is.

MEMBER GOMES: Would that not be something that

Commission would want to consider as a whole, in it's entirety, rather than severing that part of and leaving that option open? Because if we take that step and that means action has been taken, and whether or not -- I would think that some research maybe would have to be done --

MS. JORGENSEN: Most definitely.

MEMBER GOMES: -- on whether or not if we take action on part of it today and leave the rest, if we could even dismiss it after that point.

So rather than go that route -- do you understand what I'm trying to say?

MS. JORGENSEN: I think I understand what you're saying. You're asking what's the consequence if we dismiss the agreed upon portion right now --

MEMBER GOMES: Right.

MS. JORGENSEN: -- for a future claim, and I don't think it affects it.

MEMBER GOMES: Okay, you don't -- okay.

MS. JORGENSEN: Because it's something that everyone agrees to. We've had the hearing. The reason is to have the hearing to see how the parties agree. It is, in essence, a class action claim before us.

MS. BERG: Right.

MS. JORGENSEN: All the other school districts are affected when no one has come forward, so I think that portion is settled.

MEMBER GOMES: That portion, I'm talking about the remaining portion. Does that revitalize Santa Barbara's -- make it not stale for us to even entertain dismissing that part of it?

MS. JORGENSEN: And that's what I brought up. When we first sent out not their the noticing -- we sent out a notice. Their action took place after a motion was made to dismiss the entire claim.

MEMBER GOMES: Right.

MS. JORGENSEN: So the question is, there's a legal issue on that which we would have in a hearing, if you would to go forward, whether or not it was action after the fact and whether or not it could be considered, since the motion was before the Commission as to whether or not the entire --

MS. HIGASHI: There was no motion, though.

MEMBER GOMES: Well, I would be leery to take any action rather than get involved with the legality of --

MS. JORGENSEN: We've already done some preliminary research on this.

MEMBER GOMES: Okay.

MS. JORGENSEN: And it does indicate that you can have the hearing. But, again, it's the consideration of the facts and circumstances. The hearing is to have all the parties come forward and give their testimony; and then for the Commission to make their decision based

on that testimony.

MEMBER GOMES: Okay.

CHAIR PORINI: All right.

Mr. Suter, did you have a comment?

MEMBER SUTER: Yes. It seems to me that the safest thing would be to renote the whole thing as opposed to splitting it up and taking any action today.

MEMBER GOMES: Right. The safest. And that's -- depending on which way everybody wants to go, I think that would be the wisest decision, given all the legalities of what has transpired since the last hearing.

CHAIR PORINI: And I think that what I'm hearing loud and clear from members, either way, is that we would like to dismiss the Santa Barbara claim.

MEMBER SHERWOOD: What happened to my motion on this matter.

MS. HIGASHI: It didn't have a second.

MEMBER SHERWOOD: It didn't have a second?

MS. HIGASHI: No.

CHAIR PORINI: So we will give staff instructions to renote this and have it on a future agenda.

MS. HIGASHI: A future agenda.

MR. STONE: Out of curiosity, does that require a motion by the Commission? Because I sense that some confusion in the last hearing -- although I thought you were unanimous in wanting to set it for dismissal, I

noticed there was no vote and no formal directive. The Chair certainly directed the executive director. But just to close any possible doors --

MEMBER GOMES: I would certainly be more than willing to make that motion, to notice the hearing for dismissal.

CHAIR PORINI: All right, all those in favor --

MEMBER BELTRAMI: The entire.

MEMBER GOMES: The entire claim.

CHAIR PORINI: The entire claim.

MEMBER BELTRAMI: Second.

CHAIR PORINI: All right, we have a motion and a second.

Do we need a roll call or can we just do this by voice vote?

All those in favor, indicate with aye?

(Chorus of "ayes" were heard.)

CHAIR PORINI: Opposed?

Abstain?

MEMBER SUTER: Abstain.

MS. HIGASHI: Should we --

CHAIR PORINI: I think that precludes our taking action.

MS. HIGASHI: -- apply that -- should we apply that to item 9 as well?

CHAIR PORINI: I believe that precludes it.

MS. BERG: Thank you.

MR. STONE: Yes, thank you.

MEMBER BELTRAMI: Madam Chair, that raises a question on our rules. Are we working on modification of the rules in this regard?

MS. HIGASHI: The particular amendment that was applied in this situation was a modification that had been proposed during our sunset review process. And the concern --

MEMBER BELTRAMI: Well, with 80-year-old items out there pending at the time --

MS. HIGASHI: And that was why those particular changes were made a year ago.

MS. JORGENSEN: In fact, the rulemaking calendar that you approved in November, one of the things -- one of the issues of the rulemaking was withdrawal -- excuse me, dismissal of claims. So it is -- it's already in the process, and we're going to be doing it.

MEMBER BELTRAMI: Okay, we're going to be having --

MS. JORGENSEN: Pardon me?

MEMBER BELTRAMI: We're going to be having work sessions on it?

MS. JORGENSEN: Right, we're getting the calendar together to send to the office of administrative law. But you had approved this in the November meeting that that was one of our proposed regulations.

CHAIR PORINI: Do we have a inventory of all stale claims?

MS. JORGENSEN: Uh-huh.

CHAIR PORINI: I think it would be helpful if members got a list of all of those claims.

Okay, next item?

MS. HIGASHI: We've now reached executive director's report. I'll be very brief.

We've given you some workload data, and there are no major changes. The Governor's budget includes four new positions for the Commission. We're very grateful to Mr. Apps and all employees at the Department of Finance for supporting this budget change proposal.

We have requested that Senator Peace carry the local government claims bill. We're waiting to hear back how exactly that will be affected.

I'd like to introduce a new staff member, Sean Avalos (phonetic). Sean is a graduate legal assistant. He's just joined our staff, and he's a recent graduate of UC Davis and also a recent bar admittee. He's on a limited-term appointment, until the end of this fiscal year.

CHAIR PORINI: Welcome. I hope we haven't run you off by our --

MEMBER BELTRAMI: That's right, after today.

MS. HIGASHI: I'd also like to report that Camille Shelton gave birth to a baby boy last Saturday,

and mother and baby are doing well. Little brother -- older brother is not doing so well. So she is coping.

CHAIR PORINI: Good.

MS. HIGASHI: And I'd like to acknowledge our Commission staff for their participation in the United California State Employees Campaign.

Nancy Patton was our department chairperson this year, and we were one of two departments to achieve 100 percent participation. We also doubled our total contribution for the year.

CHAIR PORINI: Okay.

MS. HIGASHI: And then finally, the Commission's offices. The final lease documents have been sent to the future landlords, and they now have a May 1 move date. And we're still waiting to hear back that they've been signed.

CHAIR PORINI: All right.

MEMBER BELTRAMI: Madam Chair, a question?

CHAIR PORINI: Yes, Mr. Beltrami?

MEMBER BELTRAMI: On our staffing, how many attorneys do we have in the office now as compared to general analysts?

MS. HIGASHI: In the office right now, we have positions dedicated, we have your chief counsel, we have Camille Shelton's position and we have David Scribner's position.

MEMBER BELTRAMI: Okay.

MS. HIGASHI: We are employing Sean on a limited term because Camille is on leave right now.

MEMBER BELTRAMI: And the new positions they're talking about are --

MS. HIGASHI: Two attorneys and an analyst.

MEMBER BELTRAMI: Okay. I wish it had been the other way around.

MS. HIGASHI: Well --

MEMBER BELTRAMI: Well, let's talk about that another time.

Thank you.

MS. HIGASHI: It seems as if next month's agenda will be a repeat of many of the items from today. There might also be some additions to that agenda. And we'll also have Parameters and Guidelines amendment to pupil residency verification and appeals and a request for removal from the state mandates apportionment system.

CHAIR PORINI: All right.

MS. HIGASHI: And probably the special ed related matters would be -- at the earliest, they might be March; but we'll have to look at our calendars in terms of proper notice.

CHAIR PORINI: All right, anything else?

MS. HIGASHI: You know, I believe there might be some public comment.

MR. BURDICK: We'll submit it in writing.

MS. HIGASHI: Okay. Thank you.

CHAIR PORINI: All right, well, I'm going to take just a minute then under this portion of our calendar to ask Mr. Apps if he could come forward.

We're not going to swear you in or anything, but we are going to embarrass you for just a moment.

I think most of our -- any chair will do. I think most of our audience knows that Jim is retiring; that he's had this assignment for many years. And we just want to express to you how much we'll miss you, both your adversaries and your staff and the members of the board. And so in order for you to always remember us, we have prepared this resolution, which is quite brief, and I'll read to you.

"Whereas James -- Jim M. Apps has distinguished himself as a mandates coordinator for the Department of Finance and whereas he has been a dedicated public official for 36 years, and whereas he has advised and influenced the Commission on State Mandates in determining if cities, counties, school districts and special districts should be reimbursed pursuant to Section 6, Article XIII-B of the California Constitution and Government Code 17514; and whereas he has assisted the Commission in implementing a whole bunch of bills and sponsoring countless local claims bills, and whereas Jim Apps is being honored by the

members and staff of the Commission on State Mandates in appreciation of his 15 years of outstanding service in leadership with the Commission on State Mandates and his 36 years of service with the State of California.

"Now, therefore, be it resolved that Jim Apps is warmly congratulated upon his retirement from the Department of Finance."

And it's signed by the members of the Commission. We'll miss you.

MR. APPS: Thank you. I will miss this body also. You mentioned 15 years; but prior to that time, your predecessor, I worked with them, and I'm happy to say that this is a much better operation and I've enjoyed working with each of you folks. I may wander by, from time to time, just to see how things are going.

CHAIR PORINI: Well, you're welcome. Now, don't leave. We have one other presentation for you.

MR. BURDICK: In the spirit of true cooperation, on behalf of Carol Berg, who had to leave, what I'd like to present to Jim is a plaque from the School Services of California for his friendship to the education community and the Education Mandated Cost Network wishes to thank him for his 36 years.

And I know that in our cooperative efforts, I think that the school folks -- and I know I can speak for Carol and Jim and Mr. Petersen and all the rest -- have

felt that he has always been accessible and fair and a remarkable sometimes adversary, sometimes colleague, but he will be missed deeply by the school community.

MR. APPS: Thank you very much.

CHAIR PORINI: Paula, do you have any --

(Applause)

CHAIR PORINI: All right, with that, we'll adjourn our meeting.

Thank you.

(The meeting concluded at 12:34 p.m.)

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were reported by me at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer.

I further certify that I am not of counsel or attorney for any of the parties to said proceedings, nor in any way interested in the outcome of the cause named in said matter.

In witness whereof, I have hereunto set my hand this 31st day of January 2000.

DANIEL P. FELDHAUS

CSR #6949, RDR, CRR